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S. HRG. 98-614

PERISHABLE AGRICULTURAL COMMODITIES TRUST PROTECTION PLAN

HEARING

BEFORE THE

SUBCOMMITTEE ON
AGRICULTURAL PRODUCTION, MARKETING,
AND STABLIZATION OF PRICES

OF THE

COMMITTEE ON AGRICULTURE, NUTRITION, AND FORESTRY UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

S. 2052

A BILL TO AMEND THE PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930, BY IMPRESSING A TRUST ON PERISHABLE AGRICULTURAL COMMODITIES AND SALES PROCEEDS OF SUCH COMMODITIES FOR THE BENEFIT OF THE UNPAID SELLER, AND FOR OTHER PURPOSES

NOVEMBER 7, 1983

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PERISHABLE AGRICULTURAL COMMODITIES TRUST PROTECTION PLAN

MONDAY, NOVEMBER 7, 1983

U.S. SENATE,
SUBCOMMITTEE ON AGRICULTURAL PRODUCTION,
MARKETING, AND STABILIZATION OF PRICES OF THE
COMMITTEE ON AGRICULTURE, NUTRITION, AND FORESTRY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room SR-328A, Russell Senate Office Building, Hon. Thad Cochran (chairman of the subcommittee) presiding.

Present: Senators Cochran and Melcher.

STATEMENT OF HON. THAD COCHRAN, A U.S. SENATOR FROM MISSISSIPPI

Senator COCHRAN. The subcommittee will come to order, please.

We will begin our hearing. I would like to welcome everyone to this hearing of the Subcommittee on Agricultural Production, Marketing, and Stabilization of Prices. Today we will be looking at some problems which have become increasingly troublesome for sellers and suppliers of fresh fruits and vegetables as well as at S. 2052,[1] the legislation that has been introduced by Senators Helms and Huddleston to address these problems.

A trend has been developing recently whereby buyers of fresh fruits and vegetables have, with increasing frequency, been using the value of unpaid commodities to help finance their businesses. When such a buyer goes out of business, banks and other secured creditors usually have first claim against the buyer's assets. Standing in line with the unsecured creditors, farmers are often likely to recover only a fraction of the value of their commodities. This is especially frustrating to a farmer when his products have already made it through the marketing chain, providing profit for all involved except for himself.

Recently losses to growers and suppliers of perishable commodities have in this manner increased dramatically. It has been estimated that losses to sellers due to buyer bankruptcies increased 60 percent during last year alone. This translates into what is conservatively estimated to be a $65 million loss to the industry during the year.

[1] See p. 78 for a reprint of S. 2052; p. 82 for the staff summary of S. 2052; and p. 82 for a report on S. 2052 from the Department of Agriculture.

Closely related to the nonpayment problem is the increasing frequency with which some buyers are settling their accounts in an untimely fashion. The Perishable Agricultural Commodities Act of 1930 requires that, unless other arrangements are made, a buyer of fresh fruits and vegetables must settle his or her account within 10 days. Last year, however, only 35 percent of all accounts owed to sellers were settled within 10 days, while more than 50 percent took 30 days or longer to be settled. Only 6 years ago, 55 percent of all bills were paid within 10 days, while 26 percent were settled in 30 days or more.

The legislation proposed to address these problems, S. 2052, would amend the Perishable Agricultural Commodities Act of 1930 to provide sellers of fresh fruits and vegetables with a statutory trust plan modeled after a 1976 amendment to the Packers and Stockyards Act. This legislation would require that commodities or products derived from commodities or the proceeds from the sale of commodities, or products of commodities be held in trust until the buyer pays the seller.

This morning we will take testimony from a full slate of witnesses representing a variety of interests associated with the fruit and vegetable industry. We will no doubt hear more about both the proposed legislation and the problems which it addresses. I very much appreciate everyone taking the time and effort to cooperate with the subcommittee and be here today for this hearing.

Our first witness will be Vern Highley, Administrator of the Agricultural Marketing Service of the U.S. Department of Agriculture. Mr. Highley, welcome.

Mr. HIGHLEY. Thank you, Mr. Chairman.

Senator COCHRAN. I understand that you have a long statement which has been prepared for the committee for which we thank you, and we will make that a part of the record in full, and ask you to make whatever summary comments you care to orally. But the entire statement will be placed in the record.[1]

STATEMENT OF HON. VERN F. HIGHLEY, ADMINISTRATOR, AGRICULTURAL MARKETING SERVICE, U.S. DEPARTMENT OF AGRICULTURE

Mr. HIGHLEY. I am Vern F. Highley. I am Administrator of the Agricultural Marketing Service. I have with me today John J. Gardner, Chief of our Fruit and Vegetable Division's Regulatory Branch.

Senator COCHRAN. Welcome, Mr. Gardner.

Mr. HIGHLEY. He is also responsible for the day-to-day administration of the Perishable Agricultural Commodities Act. I also have with me John C. Chernauskas and Dennis Becker, Assistant General Counsel of the Department's Office of the General Counsel.

We do appreciate the opportunity to appear before your committee to present the views of the Department of Agriculture on the companion legislation to S. 2052, a bill to amend the provisions of the Perishable Agricultural Commodities Act of 1930: To establish

[1] See p. 31 for the prepared statement of Mr. Highley.

payment and trust requirements to insure prompt payment to supplier-sellers by receivers and buyers of fruits and vegetables.

In view of the time constraints, I am going to briefly summarize my statement.

I want it known that the Department strongly recommends that this companion bill to H.R. 3867 be passed.

The purpose of the Perishable Agricultural Commodities Act [PACA] is to suppress unfair and fraudulent practices in the marketing of fresh and frozen fruits and vegetables and cherries in brine in interstate and foreign commerce.

The act establishes a code of fair play in the marketplace and provides aid to traders in the enforcement of contracts for marketing these commodities.

In 1982, the consumer paid about $65 billion for fruits and vegetables. The farmers' share was about $14 billion. The $49 billion marketing bill amounted to some 77 percent of the dollars paid by consumers.

The fruit and vegetable industry is made up of approximately 220,000 fruit and vegetable farmers who market their crops through some 15,000 licensed trading firms. The majority of the traders are small businessmen.

Producer-marketers outnumber buyers by some 15 to 1, and because the commodities are highly perishable, sellers are under pressure to commit their supplies rapidly so as to capitalize on buyer's interest. Verbal trading results in continued exposure to misunderstandings and vulnerability to deception and fraud. The PACA protects against unfair and fraudulent practices.

The Department meets its responsibility to protect traders through the PACA code of fair play.

Fair trading requires traders to meet their contract responsibilities. Sellers must ship the produce as they have agreed to. Buyers must accept the goods and pay the invoices promptly. Prompt payment for purchases means within 10 days unless the buyer and seller have set a different time when those payments will be due.

Commission merchants, brokers, and dealers, including certain retailers and processors must be licensed. Licenses are the key to enforcement of the fair trading code.

The Secretary hears about 3,000 damage claims based on disputes about contract performance filed each year. We negotiate settlements of 75 percent of these claims, and 25 percent move on to formal hearings. We also offer a popular counseling service on contract problems.

Last year we had about 23,000 requests for counseling assistance. The service of speedy disposal of damage claims eliminates the prohibitive expense of pursuing court claims. When buyers and sellers observe the code of fair play and resolve contract problems, the consumer also benefits.

It is estimated that without the PACA fair play code, 10 percent would be added to the consumer's cost as price markups to offset against no pay risks.

Three new problems which reflect changes in the industry's financial picture currently threaten the industry.

No. 1, hidden security agreements which encumber liquid assets of buyers and divert money due to suppliers for fruits and vegetables away from the suppliers.

No. 2, climbing overhead costs including costs of debt servicing which impact trading and are reflected by a marked increase in slow pay.

No. 3, a steady increase in business failures and bankruptcy losses with no possibility of meaningful recovery.

Most business failures translate to a total loss to fruit and vegetable suppliers. A recovery of as much as 10 cents on $1 is unusual. During fiscal year 1982, reported losses due to slow pay and no pay aggregated about $32 million. Reported business failures and bankruptcies reflected losses of another $32 million.

Most fruit and vegetable marketers are small businessmen who cannot withstand repeated losses. Too frequently because the domino effect prevails, they join the ranks of the business failures.

The amendments proposed to PACA would complement the code of fair play since they are specifically directed at insuring prompt payment to producers and other sellers. The core provisions of the bill are these:

First is the determination that there is a burden on commerce caused by financing arrangements that encumber or give lenders security interest in fruits and vegetables and income from the sale of the products which have not been paid for.

Second, the requirement that commission merchants, dealers, and brokers hold in trust fruit and vegetable inventory receivables due and proceeds from the sale of food and derived products for the benefit of unpaid suppliers, sellers, or agents.

Third, the requirement that a trust participant who has not received timely payment for produce act to preserve its right to trust benefits.

Fourth, the determination that it is an unfair practice to fail to maintain the required trust.

Fifth, authority for the U.S. district courts to enforce payment from the trust and actions by the Secretary to prevent and restrain dissipation of the trust.

Sixth, that the trust provisions will not apply to transactions between agricultural cooperative associations and their members.

A nonsegregated floating trust which permits the commingling of trust assets is appropriate and would give adequate protection to beneficiaries without creating an undue regulatory burden.

The nonsegregated floating trust concept is closely patterned after the Packers and Stockyards Act of 1921, trust and prompt pay amendments which became effective in 1976. The packer trust provision has operated very successfully without imposing a regulatory burden on the industry. The packer trust and its administration have been upheld by the courts.

The legislation will give the industry and the Secretary effective new tools to deal effectively with slow pay and losses resulting from business failures.

Early alert by industry that a financial problem may exist will give the Secretary an opportunity to inform the defaulting buyer of the prompt pay and trust requirements and to track its progress in achieving compliance.

The Secretary will act to prevent dissipation of trust assets. The legislation will not replace the need for sellers to exercise good business judgment and make the necessary credit and trade rating checks before it ships goods to a buyer.

The use of these tools in a cooperative effort by industry and USDA would go far toward eliminating the undue risk burdens fruit and vegetable supplier-sellers now face. Every buyer after the farmer-producer, except the retailer, is also a wholesaler and would have trust protection when reselling produce.

The prompt pay and trust provisions would apply to all firms who are licensed to trade under the PACA and to all fruit and vegetable firms which obtain a license.

The legislation would immediately benefit fruit and vegetable trading. A turnaround domino effect would bring timely payment of earnings to traders and to farmers. Also, when there is financial difficulty, such as a business failure or bankruptcy, the produce trust assets would be paid to the fruit and vegetable sellers.

Based on PACA experience, the prompt pay and trust arrangements would conservatively result in a recovery of the known $65 million annually which is presently lost by the industry. During fiscal year 1982, the Department was responsible for recovery of about $16 million in settlements through existing procedures. With the proposed legislation in place, the total recovery of money by fruit and vegetable sellers could increase five times over present levels. Industry pay practices would improve and business failures would decline.

Present license fee authority is adequate to permit funding to carry out the responsibilities which would accrue with enactment of this legislation as well as program funding for current activities through fiscal year 1985. License fees can be adjusted as necessary to maintain the program administration. First year costs of administering the provisions of this legislation are projected at about $450,000.

Sir, that is my statement. My associates and I will be happy to respond to questions from the committee.

Senator COCHRAN. Thank you very much, Mr. Highley.

I appreciate your giving us the benefit of your observations about the legislation.

In connection with the administration of the proposed act, you state that you estimate the cost of administering it to amount to $450,000. How does that compare with present costs of administering procedures and existing legislation? Is that in addition to the current costs of administration?

Mr. HIGHLEY. Yes, sir. Our present PACA budget is about $3 million for some 80 or 82 employees, and these are dispersed out over five or so offices. We would need an additional force of some seven analysts and five clerks. Their salaries and administrative support costs and travel would approximate $450,000. We have authority to go up to $300 per license. We are now at about $180. By the way, we are very proud that we have been able to contain those costs. We feel we could add the small additional element to our staff without much of an increase. We are talking about 15,000 licensees and you would spread the $450,000 across that. We do not need additional authority at this time to increase the fees.

Senator COCHRAN. How do you arrive at the estimate of the additional savings or recoveries that would approximate $65 million? You say that under current procedures you helped collect about $15 million, and this would increase by fivefold or fourfold; how do you arrive at that figure?

Mr. HIGHLEY. A very good question, Mr. Chairman. I would like for Mr. Gardner, our technical expert here, to respond to that.

Mr. GARDNER. We have a system where we receive complaints. We find because of the lack of information the Secretary is unable to act promptly and make sure there is payment. The problem is that too frequently by the time we are informed about a problem late and the business is closed and the money is gone before a decision on liability can be handed down. This situation accounts for roughly $32 million a year that cannot be recovered. Other business failures and bankruptcies account for another $32 million because the industry as a whole recovers very little when a firm closes it doors. A recovery of 10 cents on a dollar is high. For every dollar that is recovered by the Department, $4 is lost by the industry.

Senator COCHRAN. I understand that this proposal is patterned after the trust protection plan of Packers and Stockyards Act. There has been about 6 years experience in dealing with that trust protection plan. Is it your judgment based on that experience that this proposal for fruits and vegetables would have as much success as the packers and stockyard plan has and be accepted by buyers as well as sellers as it has in the meat marketing and processing industry?

Mr. HIGHLEY. Yes. There is more variety in the produce industry than in the meat trade, the livestock trade.

I think there is a hue and cry that with the increasing cost of servicing debt load with large increases in the frequency of bankruptcies and other agreements that these firms can make that they want to have a firm set of rules by which to play. They will play by rules if everybody knows what they are and they all play by the same rules. Yes, sir, we do think we would meet with the same degree of success. We probably would have a fairly large amount of conflict on this until they got accustomed to the procedures.

Mr. GARDNER. Let me add to that, the Department is in close relationship with the industry in the normal course of current authority. We have about 1,500 personal investigations in a year, and we are in the area that deals with finance; so, this being the case, this would just give the tools to do a better job.

Senator COCHRAN. Who is going to be against this? Anybody? And why?

Mr. HIGHLEY. Well, I have been Administrator a very few months, Mr. Chairman, and I do not know of anything that has come to my desk that has had 100-percent unanimity. I am certain there are those who feel that this is an added cost of doing business. The requirements of the act might interrupt normal procedures they are accustomed to. They might feel intimidated by it.

Jack, you are in more constant contact with it. You might know who opposes it strongly.

Mr. GARDNER. I do not know.

Mr. HIGHLEY. I know Mr. Slavin—I have met with his group in New York. They thought the initial legislation contained provision for a segregated trust.

Senator COCHRAN. We will have an opportunity to hear from Mr. Slavin later in the morning. He is a witness who will appear before us.

There are other questions that have been prepared to help clarify the intent of the legislation and the administration's position with respect to it. With your permission, we will submit those in writing and ask that you respond to them in writing and we will include those as part of the record of the hearing.

Thank you very much for being here. We appreciate your cooperation.

Next we have a panel of witnesses to testify. I would ask that they come forward now. Bernard Imming, president, United Fresh Fruit and Vegetable Association; John R. Norton, chairman of the executive committee of the United Fresh Fruit and Vegetable Association; and Keith Eckel, president, Pennsylvania Farmers Association, representing the American Farm Bureau Federation.

Welcome.

We have statements I think from each of you which we thank you for, and we will include these in the record of the hearing in full and ask that you make such summary comments, abbreviated comments orally as you choose. We have other witnesses and we have a time constraint for the hearing this morning. We ask that you cooperate with us.

You may proceed.

STATEMENT OF BERNARD IMMING, PRESIDENT, UNITED FRESH FRUIT AND VEGETABLE ASSOCIATION, ALEXANDRIA, VA.

Mr. IMMING. Thank you very much. My name is Bernard Imming.[1] I am president of the United Fresh Fruit and Vegetable Association with headquarters in Alexandria, Va. United is the national trade association of the fresh fruit and vegetable industry. Its 2,600 member companies handle over 80 percent of the fresh produce commercially marketed. United's membership comprises all factors in the industry, including growers, shippers, wholesalers, and retailers.

I am very pleased to have this opportunity to appear before you to testify in support of a bill to amend the Perishable Agricultural Commodities Act by impressing a trust on perishable commodities and proceeds from sale thereof for the benefit of unpaid sellers. United has spearheaded the development of policy on this issue.

It became apparent over the past several years that one of the most urgent problems facing the entire industry was the increasing frequency of devastating losses suffered by produce sellers due to the financial difficulties of some larger customers.

Producers and shippers of perishable commodities are, for the most part, small-sized businesses. The process of growing, harvesting, packing, and shipping perishables is a real gamble. Costs are high; capital is tied up in farmland and machinery, and returns are

[1] See p. 45 for the prepared statement of Mr. Imming.

delayed until the crop is sold. If the grower-shipper cannot realize any returns on the sale of the crop immediately, he simply may not be able to survive. Thus, where bankruptcies or reorganizations occur, the growers are usually the parties least able to withstand the losses and inevitable delays which result from such actions.

These problems are similar to the ones faced by the livestock industry in 1976, when an amendment very similar to this was added to the Packers and Stockyards Act, as referred to earlier.

In our industry, we have many growers of fresh produce who are constantly dealing with customers located thousands of miles away. The very nature of fresh produce is such that it must be marketed immediately upon harvesting and, thus, there is no time to enter into credit checks, other than those that are ongoing; no means of storing or warehousing goods near the point of sale, and no real means of ascertaining the current financial condition of the many customers we deal with every year.

Normal terms within the industry require payment within 10 days after delivery of the produce, although there are many instances where credit is advanced which allows additional time to pay for the shipment. As it now stands, after delivery of the produce to the buyer, the liens established by the credit transactions attach and thus the lending agency stands ahead of the unpaid seller, if there is insolvency or bankruptcy prior to payment of the seller. In other words, under the credit arrangements which are common in today's market, the buyer is able to pass a security interest in goods received even though he has not paid for them.

I want to emphasize that we are not here trying to tamper with credit laws or regulations or with priorities established under the bankruptcy laws. We want to establish the statutory trust in favor of the unpaid seller so that the purchaser or dealer, who is licensed under PACA, or who is subject to license under PACA, holds the shipments of produce, or the proceeds derived therefrom, in trust until the seller is paid. In other words, it is the simple purpose of this amendment to prevent the dealer from passing a security interest in the produce shipments received by him until the seller has been paid.

Our purpose was to secure an amendment which would track section 206 of the Packers and Stockyards Act as closely as possible. There has been about 7 years of experience with that provision in that industry, and most of the legal issues have been ironed out in court decisions. We have worked very closely with the Department of Agriculture and it is my understanding, as you have heard, they believe the provision is desirable and workable.

There are several features of the bill that I would like to comment on briefly.

First, unlike the Packers and Stockyards Act, this trust provision will apply when credit is extended in transactions between a seller and a dealer. Unlike the meatpacking industry, it is common practice in the produce business to extend credit for reasonable periods of time beyond the time prescribed by the Secretary for payment in cash transactions.

Second, there are numerous transactions in the produce industry which involve cooperatives. Thus, grower members of a marketing cooperative enter into transactions with the co-op which then per-

forms the marketing function for the grower members. We simply do not believe that members of cooperatives need or want any protection in dealing with their own co-op. Our desire is to limit the application of the trust to situations where it is needed. And it obviously is not needed in the case of dealings between a co-op and a member and in other arrangements in the industry that can be considered as inhouse transactions.

Third, this bill amends section 2 of the Perishable Agricultural Commodities Act making it an unfair practice for a dealer to fail to maintain the trust. This would empower the Secretary of Agriculture to step in and take remedial action whenever a reasonable basis existed that the dealer did not have sufficient assets in its possession to cover payments due to unpaid sellers which were protected by the trust.

We want to make it clear that it was never our intention to use the Department of Agriculture as a collection agency for sellers of fresh produce. All we want is legislation which will enable us to protect sellers of produce. In fact, I was advised that the Secretary now has the power to institute proceedings against a licensee who fails to comply with the prompt payment provisions of the act and that the language amending section 2 of PACA adds nothing substantive but is primarily for clarification. However, I know that the Department of Agriculture, which has the responsibility for administering the act, feels the language in section 2 is necessary.

I am, of course, anxious that this amendment be workable. I support any provisions which the Department feels are required to make it work. I am also concerned that this provision be fair to all segments of the perishable industry, including the dealers, because United Fresh Fruit and Vegetable represents them too.

In my opinion, this amendment will benefit the entire industry including the dealers who are also our customers. The trust protection works for them also. In our industry there are transactions between dealers and other licensees where the trust provisions would be applicable and most of the dealers in the industry do support this amendment.

There had been some early sentiment expressed against the section 2 amendment by others who, like us, were originally of the mind that the section 2 amendment was not needed. Since that time, we have been convinced that it will not hurt the produce dealers and will be beneficial in that it removes any uncertainty which may exist regarding action by the Secretary in situations where it becomes obvious that a dealer's assets have been diminished to the point where he cannot cover invoices of the unpaid sellers.

We have avoided any possibility that we would be doing anything adverse to the lending agencies who are also our principal allies in conducting business. We are not getting into priorities or changes in the uniform commercial code or the bankruptcy laws. Central to our entire concept is that the trust relationship be created upon possession or control of the goods by the buyer. It will not change the methods of doing business by either the seller or the buyer.

As is the case under the Packers and Stockyards Act, there is no necessity that trust property be segregated or that accounts be maintained separately. In the ordinary course of business, the trust

will be of very short duration. It is extinguished upon payment to the seller.

If payment is not made, the seller is obligated to file a notice of intention to preserve the trust within 30 days after the payment is due. There will probably be many instances, even then, when the seller will not file such a notice, particularly if he is dealing with old and trusted accounts, and so the trust will be extinguished by failure to send the required notice.

I am bringing this point up before the committee because we had some discussions in the early stages of this project as to when the trust should arise, and there were some who thought the trust should not be created until there is an insolvency. This, however, would not be possible unless we start changing the established lien laws and priorities which have been so painstakingly worked out and with which the financial institutions are familiar. Consequently, we have adopted the same concept of section 206 of the Packers and Stockyards Act. It has solved an urgent need for safety and stability for producers of livestock and I believe there is even a greater urgency and need for security and stability on the part of sellers of fresh produce commodities.

So, Mr. Chairman, on behalf of the United Fresh Fruit and Vegetable Association, the trade association which does represent the industry, we urge the subcommittee to act favorably on this legislation.

Senator COCHRAN. Thank you, Mr. Imming for an excellent statement.

Mr. Norton, John Norton, chairman of the executive committee of the United Fresh Fruit and Vegetable Association.

STATEMENT OF JOHN NORTON, CHAIRMAN, EXECUTIVE COMMITTEE, UNITED FRESH FRUIT AND VEGETABLE ASSOCIATION

Mr. NORTON. Thank you. Mr. Chairman and members of the subcommittee, my name is John Norton.[1] I live in Phoenix, Ariz., and I am a grower, packer, and shipper of fresh fruits and vegetables. I am the chairman of the executive committee of the United Fresh Fruit and Vegetable Association and formerly chairman of the board of the Western Growers Association. I hereby offer the following testimony today in support of a bill to amend the Perishable Agricultural Commodities Act by providing a trust protection plan.

The Perishable Agricultural Commodities Act creates a program of rules and regulations intended to provide equity and prevent abuses in the conduct of interstate commerce in perishable fruits and vegetables. The marketing of perishable fruits and vegetables is among the most risky and complex marketing situations that exists. PACA has contributed immensely to orderly, responsible, marketing practices for the benefit of the industry and the Nation as a whole. It is our desire to amend the act in order to improve its effectiveness and further the original goals.

Growers and shippers who are sellers of fresh fruits and vegetables often face the problem of attempting to collect for their produce from an insolvent buyer. By the time the buyer or receiver

[1] See p. 52 for the prepared statement of Mr. Norton.

becomes insolvent, a number of things have often occurred; namely, the buyer has been weak financially and overextended in his credit relationships for some period of time. As a result, banks and lending agencies with whom he does business have already attached his accounts receivable and inventory, and so forth.

It is commonplace for the general or unsecured creditors to receive a very small percentage return after the secured creditors.

Under the present law, we who ship the fresh fruits and vegetables which often generate the total source of income potential for the insolvent firm, are on the bottom of the list as unsecured creditors. Produce which the buyer has not paid for provides or generates funds for the lender or banker to whom the accounts receivable are assigned. Fresh produce is a fast moving item and a financially distressed receiver can, in a few weeks time, receive thousands and thousands of dollars worth of fresh produce and in turn sell it to his customers thereby converting this inventory to accounts receivable very quickly. If all the accounts receivable have been collateralized as security for loans, then the secured lender will have precedence over all the unsecured suppliers of the produce. In effect, sellers who have supplied fresh produce commodities and have not been paid, have provided the equity capital for this buyer's business operations.

The livestock industry sought and obtained a similar amendment to the Packers and Stockyards Act in 1976 which has successfully addressed this problem and has provided substantial relief for those who ship slaughter livestock to a meatpacker.

An official of the Packers and Stockyards Division has advised me that their collections under the trust plan, since their act was amended in 1976, have now exceeded $20 million on behalf of the sellers of livestock.

There is no evidence that financially sound receivers who possess the equity needed to support their operations need fear this proposal. And those who do not possess the equity necessary to support their operations should not be permitted to do so with values created from unpaid for produce. A produce seller has an awesome task in evaluating, monitoring, and controlling credit arrangements with dozens of buyers scattered across the entire Nation.

Enlightened buyers should be able to understand that this proposal will only give the sellers the right to demand that the money received from subsequent sales of their produce be properly used to cover their invoices before other creditors can completely attach the proceeds.

In conclusion, I would like to emphasize to your committee the very thorough degree to which this proposal has been debated, discussed, and publicized in our industry. Industry trade papers, such as "The Packer," the "Produce News," and the "Fruit and Vegetable Reporter" are distributed nationwide to virtually every buyer and seller of fresh produce in the United States. Each of these publications have responsibly reported the many industry discussions and the views of both proponents and opponents of this legislation during the last year and a half. The proposal has been presented to and debated by the boards and memberships of many organizations. A workshop during the United Fresh Fruit and Vegetable

Association Convention last February was devoted exclusively to this topic.

My written statement being submitted here today includes a list of 27 regional trade associations and commodity groups who have endorsed this proposal, including two Chicago wholesalers. Also the terminal marketing division of the United Fresh Fruit and Vegetable Association, representing wholesalers in major markets across the country has unanimously endorsed the proposal, and just last week, the Baltimore Wholesale Receivers endorsed the proposal.

I submit that this is one of those rare and rewarding examples of when an industry can come to the Congress with a clear and responsible request for legislation which has such a broad mandate from all segments of the industry and every geographical part of the Nation. Therefore, I respectfully urge your immediate and favorable consideration.

Thank you.

Senator COCHRAN. Thank you, Mr. Norton for your statement.

Keith Eckel, president of the Pennsylvania Farmers Association, representing the American Farm Bureau.

STATEMENT OF KEITH ECKEL, PRESIDENT, PENNSYLVANIA FARMERS ASSOCIATION, REPRESENTING AMERICAN FARM BUREAU FEDERATION

Mr. ECKEL. Senator, I appreciate the opportunity to testify here today as president of the Pennsylvania Farmers Association and representing the largest voluntary farm organization in the United States, the American Farm Bureau. [1]

As you are aware, we represent all types of producers and virtually every agricultural commodity.

I especially appreciate the opportunity to appear before the committee today to testify to you since I am a fresh vegetable grower back in Pennsylvania. So this testimony has considerable meaning to myself as an individual as well as my organization.

Since 1930, the Perishable Agricultural Commodities Act has served the produce industry well. PACA has required prompt payment between buyers and sellers of perishable agricultural commodities, such that a seller has to wait no longer than 10 days before receiving the proceeds from his sale. In addition, PACA has served as a licensing mechanism for those in the produce industry so that business from the farmer to the grocery store is conducted in an open, forthright, and honest manner.

Recently, increasing numbers of firms and businesses have begun to slow down payment to sellers for perishable agricultural commodities. In addition, buyers are declaring bankruptcy with increasing frequency or are refusing to pay for contracted perishable commodities because of insolvency. Recent statistics show that slow pay situations, that is instances in which buyers pay sellers 30 days or later from the time of receipt of invoice, have increased from 26 percent of all sales in 1976 to 50 percent of all sales in 1982. At the same time, the percentage of those who have fulfilled the obligations under the current PACA and pay within 10 days has de-

[1] See p. 57 for the prepared statement of Mr. Eckel.

creased from 55 percent in 1976 to 31 percent in 1982. The result of this increasing frequency of slow pay and no pay situations is an annual cost to producers of $32 million.

Increasing numbers of bankruptcies among buyers have resulted in the seller, often the producer or grower/shipper, being left holding the bag. That is, the seller has no way of recapturing monies due on accounts receivable in situations which a buyer declares bankruptcy and a court has retained control of all assets, to be distributed first to creditors such as banks and lending institutions. Such bankruptcies have resulted in an additional $32 million annual cost to producers.

It has become evident that U.S. producers of fresh fruits and vegetable crops need additional protection in slow pay and no pay situations.

The unwritten traditional trust relationship that has existed between sellers and buyers is being broken with increasing frequency. Many sellers are ruined financially and contribute to the previously mentioned $64 million total.

Farm Bureau supports the establishment of a statutory trust as contained in the Senate 2052. Such a trust, administered by USDA under the PACA, would provide sellers of fresh fruit and vegetable crops some degree of security in the marketplace. It would insure that this traditional trust relationship that exists within the marketplace could be maintained by:

First, finding that a burden on commerce is caused by financing arrangements under which buyers, commission merchants, dealers or brokers, who have not made payment for perishable agricultural commodities, encumber, or give lenders a security interest in such commodities, and that such arrangements are contrary to the public interest.

Second, requiring that perishable agricultural commodities received by a buyer on all transactions, and all inventories, receivables, or proceeds from such perishable agricultural commodities, shall be held by such buyers in trust for the benefit of all unpaid sellers until full payment is made.

Third, defining as an unfair trade practice the failure of any buyer to maintain the trust for the benefit of the seller as required under this legislation, the violation of which would subject the buyer to suspension or revocation of his PACA license.

My statement continues, and is printed for the record, but I would like the Senate Committee to indulge for just a couple of moments to relating a couple of personal incidents that I relate as far as the seriousness and gravity of the problem.

The thing that I want to emphasize to the committee today is that the problem with slow pay and bankruptcies has come to be a very serious situation for every producer and shipper of fruits and vegetables in this country. And it becomes a very personal problem when you are involved in that business yourself.

In the last 2 years, my own business, which is operated by myself, my father, and my brother, were engaged with three different operations, three different sales, in which of a total of over $30,000 in lost revenue was suffered as a result of those firms becoming insolvent and being bankrupt. On a family farm operation of modest size that has considerable impact on the bottom profit

line, to the point that if that occurs in one year, one questions whether one can financially survive. We have a very strong concern about the threat to the economic security of our farmers as a result of this situation.

To emphasize the seriousness of the situation, I have with me today a gentleman by the name of Richard Pollman involved in the production of mature green tomatoes, fresh commodity products. Their own operation in 1981 dealt with two situations which resulted in a loss to them in excess of $17,000, even though the PACA people did all that they could to revoking the licenses. The point is that revocation of the license does nothing to restore the moneys involved that are lost.

Another risk that farmers are taking as far as bankruptcy itself is concerned that Pollman Farms were involved with, in one case where one of their customers filed bankruptcy, that customer had already paid the bill, but the Federal Bankruptcy Court came back to them and ordered that all moneys paid within 60 days of the filing of the bankruptcy had to be submitted back to the Federal court. In this instance, when it was all over, they received 50 cents on the dollar.

The seriousness of that situation is that the grower/shipper then has to monitor not only those accounts that are not paid, but even those accounts that appear to be paid. And the gravity is increased when you consider that a number of the grower/shippers appear in this country sell a sizable percentage of their crops to one individual. If a situation like that developed with Pollman Farms, with a client that you normally sold 7, 8, or 10 loads of produce, it might very well mean that you also would be filing a bankruptcy proceeding as well as the person that was buying the product.

I mention that only to indicate the severity of the problem to some of those growers. Mr. Pollman is here, if the committee would want to question him on those particular situations. The point that I want to make is that this is a very serious and real problem. It is a clear danger to the producers and shippers of fruits and vegetables in this country.

I am pleased that the Senate is making a very strong attempt in S. 2052 to address this very serious problem. And I am pleased to indicate to you today that the American Farm Bureau Federation urges the passage of this bill and offers to help in any way that they can in bringing this bill a reality into the law.

I want to thank you for the time of the committee.

Senator COCHRAN. Thank you, Mr. Eckel, for your testimony. You pointed out a few instances and examples where growers have suffered losses because of insolvency or bankruptcy of buyers. How prevalent is this in your State? Are these instances isolated instances, or is there widespread difficulty throughout the fruit and vegetable industry in Pennsylvania?

Mr. ECKEL. I would say that it is becoming more widespread all the time. It is not isolated. As I sat in the committee chambers waiting for the hearing to begin, I began to think of the local growers that I am particularly familiar with in my neighborhood. I cannot think of one of the local five packers who are involved in business that did not have insolvency problems with purchasers in

the last 2 years. And I think that is a very serious statement to make, and a sad statement to make.

Senator COCHRAN. How large are these operations? You mentioned these family-size farms. Can you give us some idea about the size of them in terms of net profits and acreage?

Mr. ECKEL. Certainly. Net profits might be more difficult to nail down since I do not have access to their financial statements. I would indicate to you in the five operations that I have reference to in saying that all of them have dealt with these problems in the past 2 years, that the size of their acreage goes anywhere from 120 acres to 300 acres. So they are relatively small shippers.

In my own situation, we grow 280 acres of mature green tomatoes and we ship approximately 180,000 cartons per year, and we are slightly above average in size, to give you some idea. I can tell you that in 1982, the losses that we sustained as a result of insolvencies amounted to 30 percent of the net profit of our business. And that is serious.

Senator COCHRAN. Thank you very much.

Mr. Imming, I know that this legislation is aimed at protecting the interests of sellers of commodities. Your organization includes both sellers and buyers of fresh fruits and vegetables. Why do your buyers support the trust protection plans?

Mr. IMMING. Because, in fact, many of these buyers are also sellers who sell to others. In some of the cases that are now on record of insolvencies and bankruptcies, those wholesalers who are buyers in major cities have also lost a heck of a lot of money. The legislation is intended to protect any licensee or one who is subject to license under the PACA and, therefore, would protect buyers who again resell. For example, I understand that at a meeting in Baltimore last Friday evening, some reference was made to losses, major losses in recent years, and they were referring in this case to the well known Food Fair bankruptcy. And, while Food Fair was headquartered in Philadelphia, the men were saying: "Wow, did we get hit in Baltimore." Several took a bath in that particular one because they, in turn, were selling to Food Fair. I think the fact that fresh fruits and vegetables are perishable, and that the turnover is so rapid in these products generally, they are relatively easy to buy, and large retailers do buy from many wholesalers as well as directly from shippers. Many wholesalers also sell to other smaller operators and so on. This is why they are interested.

Senator COCHRAN. Is it also true that retailers find the proposal acceptable as well as bankers, people involved in financing of these businesses?

Mr. IMMING. My understanding is, treating the second part of the question first, Senator, the bankers have found their experience in the Packers and Stockyards Act to be tolerable, and, therefore, I suppose they would extend the same feelings toward this proposal. As for the retailers, it seems to me that this would bring pretty good order to the marketplace and provide a kind of stability so that prices retailers have to pay for produce which they in turn sell to consumers actually would reflect the stability of the financial scene. I cannot speak for them, of course, but on our board of directors we have four representatives of major retail organiza-

tions, including the Kroger organization, which is the second or third largest chain in the country.

Senator COCHRAN. Mr. Norton, I understand that in the industry the trust protection proposal which we are discussing is known as the Norton plan. How long have you been at work developing the proposal, or have you?

Mr. NORTON. Well——

Senator COCHRAN. It has been justly named.

Mr. NORTON. I do not know about that. If it goes down in flames, maybe I will wish it was not named that. I have been in the livestock business as well as the fresh fruit and vegetable business all of my life, and I knew about this action taken by the livestock industry through the amendments to the Packers and Stockyards Act. So, in consultations with Bill Jones, who is the Administrator of the Packers and Stockyards and who is in the audience this morning, and with Jack Gardner, who is the Administrator for the PACA, I decided that maybe this thing could be applied to our industry with the same beneficial results. And I got tremendous assistance from both of those fine gentlemen which I think enabled me to kind of get it off the ground. I want at this time to take the opportunity to thank the Packers and Stockyards for the help they gave me. But I proposed it to the industry first in a meeting in Idaho, in June 1982, when I was chairman of the board of United Fresh Fruit & Vegetable Association, and it was well received. This was a commodity group, a regional group in Idaho. And then I spoke before several other groups during the course of the year in the State of Washington, the Western Growers Association in Arizona, California, the Texas Association, and the Florida Association. It got such a ground swell of support that I realized that I had kind of started a big diesel locomotive and I was riding on this thing. So we have carried it to this point and been well received by legislative counsel in both the House and Senate Ag Committees, and we have been given tremendous support by the USDA. I think I really am proud of the fact that it has such broad support and it seems to develop so few negative references in the industry. So if it is the Norton amendment, and if it gets passed that way, maybe I can be proud of that.

Senator COCHRAN. What are the reasons for the trend of buyers using unpaid commodities to finance part of their businesses, and why have losses due to bankruptcies and slow pay been increasing so dramatically?

Mr. NORTON. I do not know exactly why it has increased dramatically. The pattern, as is presented in my testimony, we kind of make a joke in the industry that sometimes when we ship something from the west coast, a carload of lettuce or whatever it might be, it is shipped across the country; it is unloaded and distributed to a retail store. It is put on the shelf, it is bought; it is taken home and made up into a salad; it is eaten, digested, and eliminated before we have gotten paid for it. And that can all happen in 30 days and we are getting an awful lot of our receipts that are not paid for in 30 days. I guess slow pay is chronic to a lot of industries because of the high value of money, interest costs that we have had in our country in the last few years and people have learned to play the other guy and use that as an interest saving.

What this does though in our business when they collateralize their accounts receivable and inventories with the lender, or factoring agent, then when there is an insolvency, there is really virtually nothing left for the supplier of the produce. We think this is kind of unfair and it is something that is hard to cope with when you are shipping to people across the country. It is very hard to monitor on a real current basis, an account that you are selling to a couple thousand miles away. And while I will not allude to the intent, it appears sometimes that when you try to seek information about a firm that is verging on insolvency, you sometimes get cloudy or vague reports that serve the interests of the lender.

Senator COCHRAN. Are there any commodities that are exempted, or does this apply to all commodities? I am thinking about a friend in my State, really a distant relative, who has peach orchards. Would he be covered by this if he personally sells to people, which he does, around the South, particularly?

Mr. NORTON. If he is a seller of peaches to a person who is required to be licensed under the Perishable Agricultural Commodities Act, he would be protected.

Senator COCHRAN. I know of a couple of instances where they have been left holding, instead of the bag, in this case, a bushel basket.

Mr. NORTON. We think—there is a little misconception too. The person I sell to can still collateralize his accounts receivable, but that collateralization would be subject to me being paid. What I am saying is I do not care if he collateralizes his accounts receivable; I do not care what his relationships are, but I do not want those to deny me the ability, as the original supplier, of the very foundation of this chain of credit, to be denied any ability to get paid simply because somebody has been able to attach a legal instrument on it at the other end.

Senator COCHRAN. Mr. Eckel.

Mr. ECKEL. I think the point is that the law already requires prompt payment, which is 10 days. And what we are trying to do is protect ourselves in the event that that individual cannot pay after 10 days. He really, in collateralizing those accounts receivable, he is collateralizing those that are due after 10 days, he is already anticipating violating the law. The concerns that you have raised about bankers, I think it would be a misconception for the committee to think that only the purchasers of fruits and vegetables use banks. The financial community has a tremendous investment in agriculture, and I know that my banker at home has strong concerns that I am able to collect on my accounts receivable. So it is extremely important to that segment of the financial community that lends to grower/shippers that payment for the commodity is made. So I would think there were different interests within the financial community as far as this law would be considered.

Senator COCHRAN. I appreciate very much the testimony that this panel has given the committee. It has been very helpful and very well presented. Congratulations for that.

Thank you for being here.

I am sorry, Senator Melcher for not recognizing you were here sooner. Do you want to make a statement?

Senator MELCHER. No, thank you.

Senator COCHRAN. Our next witness is Arthur Slavin, who is executive vice president and general counsel of the New York Produce Trade Association. Welcome to the committee. We appreciate your being here.

Mr. SLAVIN. Thank you, sir.

Senator COCHRAN. I have a copy of your statement, which we thank you for. We will make that a part of the record in its entirety and ask you to summarize it.[1]

STATEMENT OF ARTHUR SLAVIN, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, NEW YORK PRODUCE TRADE ASSOCIATION, INC., BRONX, N.Y.

Mr. SLAVIN. Having heard what has been said so far, and anticipating what is going to be said later, and looking at my position on this list of witnesses, I must tell you I feel like the inside of a sandwich.

Gentlemen, let me state this: In all of my professional career, which is 44 years in the practice of law, I have looked for a situation where the whole world was wrong and I was right. I think I have found such a situation at this point.

My name is Arthur Slavin. I am executive vice president and general counsel of the New York Produce Trade Association. I might state, parenthetically, that I am also general counsel for the New York branch of United Fresh Fruit and Vegetable Association, the organization which is sponsoring this legislation.

Our organization is a nonprofit membership organization, incorporated as a board of trade for those merchants in the New York City terminal market.

Our terminal is the largest in the world, receiving and distributing perishable agricultural commodities in carloads and carload equivalents from all corners of the country and foreign countries, and exporting domestic agricultural commodities to foreign countries all over the world. We number approximately 100 separate trading firms, employ about 6,000 people and do an aggregate business of between $2½ million and $3 million a day. The statement which I make here represents the views and opinions of all of our members regarding the proposed amendments to the Perishable Agricultural Commodities Act.

We oppose H.R.—I am not using your Senate number because I did not have it at the time—but I will refer to it as H.R. 3867, with your permission, sir. We oppose it in its entirety and in the strongest possible terms.

The drafting of H.R. 3867 must be commended for its simplicity, but the extreme simplicity could make it a dangerous law, and the danger lies not in what it says, but in what it does not say.

At the outset, there seems to be great reliance upon comparing the applicable trust provisions of the Packers and Stockyards Act with H.R. 3867. I respectfully submit that any comparison is completely unwarranted and important distinctions exist:

(a) The Packers and Stockyards Act is limited in its application to packers only; in other words, from ranchers to packers.

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[1] See p. 59 for the prepared statement of Mr. Slavin.

(b) The Packers and Stockyards Act trust provisions apply to cash sales only. Sales on credit are exempt from the application of its trust provisions.

(c) The Packers and Stockyards Act, section 409, requires packers to pay the full purchase price of cash sales to the sellers before the close of business the next day following the purchase and transfer of possession of the livestock, or, if on a grade and yield basis, before the close of business on the next business day following the determination of the purchase price. The trust provisions of that statute are relatively short in their application and there is little impact on the business upon the packer. You are dealing with 2 days. It would be a grave error to compare the business impact of such provisions against that which would be suffered by buyers of fruits and vegetables.

(d) The packers to whom that law applies are only a few hundred in number. There are at least 16,000 licensed dealers under the Perishable Agricultural Commodities Act. It would be safe to hazard that there are at least twice that number who are not licensed, but are subject to license. Parenthetically, H.R. 3867, it would seem to us, should be applicable to those who are subject to license as well as to those who are licensed, but the statute is silent as to those who evade the license requirements. In this respect, the proposed statute also fails.

On the other hand, H.R. 3867 applies to all sellers; growers, shippers, packers, receivers, jobbers, chainstores, and even to retail stores. It also applies to sales on credit, and the terms of such credit can range from 3 to 6 weeks, and possibly longer.

Contemplate for a moment a normal transaction in the fruit and produce industry:

Produce purchased f.o.b. in California for delivery in New York will be delivered to our terminal about 5 days from the sale date. Although title to the commodity passed to the buyer at the moment it was placed aboard the carrier at the point of origin, H.R. 3867 would nevertheless impose a trust upon it at that moment. Upon receipt of the commodity by the buyer, he must refrigerate, store, and sell it, at his own cost and expense. Upon resale, his customers may pay him at times ranging from 3 to 6 weeks. During all of this time the commodity, and the cash and accounts receivable emanating from this transaction, must be held in trust by him until his seller has been paid in full. In the intermittent time since he acquired title, the buyer has had his own considerable investment in the shipment; freight, handling, storage and refrigeration, rent, labor, and other costs of doing business, and they may be as much again as the cost of the commodity.

As written, H.R. 3867, shorn of its collateral language, provides simply:

One, such commodity, and the accounts receivable derived from the sale thereof, shall be held in trust for the benefit of all unpaid sellers of such commodity, and

Two, it shall be unlawful to fail to maintain the trust.

The basic law of trusts, from ancient days to the present time, requires trust property to be segregated from nontrust property. Nothing in H.R. 3867, or in any statute or case law, to my knowledge, exempts the trust established by the provisions of H.R. 3867,

or shields the buyer-trustee from this basic tenet. It must then inexorably follow that such trust res, or property, may not be used for any purpose other than to pay the seller of the commodity before the trust is released. Since the merchants in our terminal, like countless other buyers throughout the country deal in no commodities other than perishable agricultural commodities, how then will he pay his labor, rent, and other costs and expenses of doing business?

The proponents of H.R. 3867 have widely published, erroneously, we believe, that segregation of trust from nontrust funds is not intended or contemplated by this statute. But the language of the bill plainly states that the trust is established at the moment of sale and that failure to maintain the trust is unlawful. If nonsegregation is, in fact, the intention of Congress, then the bill should plainly say so, and therein its silence is deadly to the buyer, and creates much of the opposition to the bill.

I would like to depart from my prepared statement for a moment to make you aware of the fact that for a period of 1 year I have, on behalf of my people, negotiated with the United Fresh Fruit and Vegetable Association with respect to that aspect. And I think we had met in New York, in California, in Washington and in Dallas/Fort Worth, Tex., the last being in Dallas/Fort Worth, Tex., where we did come to some understanding that if the segregation issue could be solved, we would not oppose this bill, not that we liked it, but as a compromise.

I must tell you that this was agreed upon, and that that compromise had been made. But, to our astonishment, when the bill was printed, we found that it had been omitted. Therein lies our opposition, among other things.

Senator MELCHER. Mr. Slavin, as long as you are not in your prepared remarks right now, what does your reference to meatpackers have to do with this bill?

Mr. SLAVIN. Because the United Fresh Fruit and Vegetables Association, in fostering this bill, has referred constantly to the fact that the meatpackers bill is the basis for this bill. They follow closely upon it in thought and in intent. They look to the success of the meatpackers bill to foster this bill. Questions have been asked here of them with respect to the meatpackers bill. Additionally, prepared statements have referred to the success of the Packers and Stockyards Act. I could not possibly treat with this subject without going into the Packers and Stockyards Act, because I say there is absolutely no relation between one and the other.

Senator MELCHER. The payment, however, is quicker under the sale of livestock, is it not?

Mr. SLAVIN. Yes, it is overnight, or possibly in 2 days, and that is the difference. Because the trust in our situation would extend to a period of up to 6 weeks and longer, and keeping our money segregated and in trust for 6 weeks would be devastating. It would be destructive. It would be a violation of every commercial practice that we know of today.

Senator MELCHER. Then for my comparison, I would say the Packers and Stockyards Act requirement of the packers is much more stringent and they get along OK on how they pay their over-

head while they get rid of the meat. So I do not follow your point. The point that the overhead goes on, goes on for the packers too.

Mr. SLAVIN. I cover that point subsequently, respectfully, if you would reserve it, I would be glad to treat with it.

Senator MELCHER. Thank you.

Mr. SLAVIN. In support of their contention that segregation of trust from nontrust property is not required, the proponents of H.R. 3867 rely heavily upon the landmark decision by the U.S. Court of Appeals, Fifth Circuit, in the case of the *First State Bank of Miami* v. *Gotham Provision Co.,* and I give the citation, involving the trust provisions of the Packers and Stockyards Act. In that action, a bankrupt's accounts receivable were derived from both cash sales and credit sales, and it could not be established which came from cash and which came from credit.

The court established two principles in this action: First, that it was not the intent of Congress that a separate trust account must be established for each seller, but that all such accounts may be commingled in a separate trust account, which is called a "floating pool," to be held for the benefit of all such sellers, to be shared by them pro rata; second, it restated the time honored basic law of trusts that when trust items are commingled with nontrust items, the trust will extend to the entire commingled fund. But nowhere in this landmark decision is it even inferred that trust funds need not be segregated from nontrust funds. The court simply unravelled the tangled situation as it found it.

The establishment of a trust covering the buyer's inventory and cash and accounts receivable derived from the sale of the commodity gives rise to another danger equally as grave. In the normal economy of this Nation, most business organizations regularly borrow from banks. This applies not only to fruit and produce buyers, it applies equally to General Motors, United States Steel and RCA. Such borrowing does not reflect adversely upon the worth or creditworthiness of the buyer. It furnishes greater working capital, cash flow and liquidity for business firms. It is a normal and healthy economic tool in a capitalistic society. Even the proponents of H.R. 3867 employ this tool in the operation of their respective businesses.

Requisite to all bank loans is the submission of the applicant's financial statement. What would a normal balance sheet of a fairly successful fruit and produce merchant look like if you subtracted the cash, inventory and accounts receivable from the assets column? Yet, this would be the effect of impressing a trust on these items. Such property in trust would not belong to the buyer. It would belong to the seller until he was paid.

The financial statement would have to reveal the trust nature of these assets. Failure to disclose would be tantamount to rendering a false financial statement. What effect will such disclosure have, bearing in mind that in the case of the average receiver of fruits and produce his inventory and cash and accounts receivable could constitute all of his assets—or should he not disclose.

Is he not in the typical catch-22 situation—damned if he does and damned if he does not? I submit that it is extremely unlikely that the specific omission of his inventory, accounts receivable and moneys derived from the sales of produce, from his balance sheet

will win him the approval of his loan application. At the very best, the amount of the loan would be severely curtailed.

The inability of the small businessman to obtain bank financing must result in driving him out of business, and in increased bankruptcies and unemployment. How can this be in the public interest?

How about supermarket chains? The basic law of trusts imposes upon a trustee to keep the trust property separate from his own property. The trust property must be segregated and cannot be used for anything but trust purposes. It cannot be used for operational costs, payroll, rent, et cetera. How will the supermarket chain handle this? Can you envision the resultant bookkeeping nightmare?

And how will we solve the anomaly of title passing to a buyer, in f.o.b. sales, by the commodity being held in trust for the seller? To whom does the commodity belong until the seller is paid? When, in such sales, the commodity is placed aboard the carrier, the risks of transportation shift to the buyer. Who is the owner? The seller or the buyer trustee?

This illustration is only the tip of the iceberg. Tampering with the basic and established rules of commerce in this industry may produce many such strange anomalies. The whole pattern of normal commercial and financial business transaction in this industry could be shattered by the passage of this bill, bearing in mind that the assets of even a highly successful firm are generally not liquid enough to provide sufficient cash flow and working capital without bank financing.

In this regard, it is important to note that the monies borrowed by such a company from its bank are used to pay for purchase of commodities from the very sellers who are promoting the proposed trust plan.

In our opinion, the proposed trust provision is unrealistic and unworkable. It is destructive to the whole pattern of normal commercial business practice. It is also counterproductive and self-defeating, since it would work an effect quite opposite to that which was intended. It will result in slower payments or inability to pay, precisely because it will have reduced available working capital, cash flow and liquidity. In that event, the trust may become an empty one, devoid of assets. The proposed trust provision will create a monster. It will boomerang and harm the very persons sought to be protected.

I have practiced in this industry for over 40 years and the number of significant bankruptcies of receivers in our market during that time can be counted, figuratively, on the fingers of two hands. In half of those, shippers' losses were caused by poor and hazardous trade practices.

This is an excellent record. Is it now intended to introduce big brother regulation and supervision to eliminate the need for sensible internal credit practice on the part of the shipper? What does the ordinary businessman do to safeguard his accounts? He avoids selling a credit risk. If he wants to be paid in 1 week, 1 month, or 1 day, he makes that a term of the sale. He does not run to big brother for regulation. That is his job, not that of Government. To

seek regulation from Congress to provide against relatively few business failures seems nothing short of overkill.

This industry is already heavily regulated, under the watchful eye of the regulatory branch of the USDA, by the most stringent provisions known to Federal law. Poor payment practices can be remedied by applying the existing law.

H.R. 3867 is harmful not only to the buyer, but also to the small farmer. As long as I can remember, it has been a common practice for the receiver of perishable agricultural commodities to finance growing operations of small farmers by the advance of substantial moneys for seed, fertilizer, labor, and packing materials, and be reimbursed from the proceeds of the crop. The receiver's source of such advances is his bank. Bank reticence will surely result from passage of this bill and will curtail these necessary advances to the small farmer and possibly drive him out of farming.

We already know that the small receiver will be hurt by this bill. Do we want to put both the small receiver and the small farmer out of business? Who will benefit thereby?

The introductory paragraphs of H.R. 3867 declare that a burden on commerce exists, and that the bill is designed to protect the public interest. We respectfully suggest that there is no basis for such declaration and that the opposite is true. The passage of the bill will create an undue burden on commerce and is against the public interest.

Thank you for this opportunity to express our opinion regarding H.R. 3867.

Senator COCHRAN. Thank you, Mr. Slavin.

Senator Melcher, would you like to proceed with your line of questioning about the Stockyards Act and its relationship?

Senator MELCHER. Yes, I would. I thought you were going to get back into it in the balance of your testimony, but I did not hear anything about it.

Mr. SLAVIN. Only in this sense: If you want to cut down slow pay, sell on that basis. You already have an act, a law which regulates slow pay. We have a very effective regulatory division in the Department of Agriculture. It probably has the most stringent enforcement provisions that I have ever seen in Federal law. You have got $450,000 to enforce this new regulation. Give them that $450,000 and tell them to enforce the present regulation. You have a 10-day provision; enforce it. That is the way to do it. You do not need legislation for this.

Senator MELCHER. Well, I sat here in this Congress when we finally put into the statute a requirement to pay for your cattle and livestock the day they got them. There was a lot of reason then to wonder about whether packers could survive. You testified that the fruit and vegetable people would never go bankrupt. If you could count them on one hand, there must be five or six.

Mr. SLAVIN. Respectfully, I never said that.

Senator MELCHER. What did you say?

Mr. SLAVIN. I said in 44 years of my practice in this industry, figuratively, you could count the number of bankruptcies that we have had in our market on the fingers of two hands.

Senator MELCHER. Two hands.

Mr. SLAVIN. Figuratively.

Senator MELCHER. Figuratively.

Mr. SLAVIN. I am figuring 10.

Senator MELCHER. The packers had to bite the bullet when it became the practice in the trade. I do not know what the alternative is.

Mr. SLAVIN. There are alternatives, sir. They have a big precedent, in my opinion. New York, for instance, just New York State, has just amended its agricultural laws to provide a method of protecting the farmers in that State. And what they have, they have a surcharge on the buyers of New York agricultural products in which they have to contribute to a fund anywhere from $1 up to $4,000, depending on how much business they do, which goes into a huge fund for buying insurance for the protection of the unpaid seller.

That is one alternative.

Another alternative could be bonding. In any event, I do believe a farmer should be protected. We all believe that. We believe they should be protected in any way possible so long as it does not have that effect upon us. If it does not tie up our cash flow; if it permits us to operate without putting us out of business, we would be happy.

I, frankly, do not understand why there cannot be written into this law a provision which would permit the nonsegregation of the trust funds.

Senator MELCHER. Well, I am just going to use my own experience. Anything that the State did to protect the seller would be like taking care of a few people, and is not very satisfactory under any circumstances. My State cannot afford to do it on cattle. I do not know whether these other States can, but they are not doing it.

Second, in that regard, this is interstate commerce and it is a Federal responsibility, but we finally did just say, "Pay when you get it, like everybody else has to do in this modern world. Pay when you get it."

Sure, you can sell on consignment if you want, or you can make your own deal if you want, but in the trade it was not done. If a cattle seller wanted to set his own condition, you might as well be talking to a wall.

My other question is, and I do not know much about fruits and vegetables, but, as far as I know, it is the same principle, you get paid after you have delivered it, and after it has left your hands you no longer have a bit of control over it. If you do not like the trust, how would you like being exactly like the packers—cash on the barrel head when it leaves the hands of the producer?

Mr. SLAVIN. You are dealing with relatively few packers, for one thing.

Senator MELCHER. 1,600.

Mr. SLAVIN. Again, I do not want to get into a quarrel about this.

Senator MELCHER. Using your figure, is it not 1,600? The figure that was given by the chief of the Packers and Stockyards was, I believe, 700 or 800. Am I correct about this, Jack?

VOICE. There were 1,000 at the time the law was enacted. Attrition and joining hands resulted in about a year ago there were 850.

Senator MELCHER. Well, I will not belabor the point. It seems to me that this trust arrangement is for the sake of the people you represent as it is for the growers.

Mr. SAVIN. Except this——

Senator MELCHER. You just pay cash on the barrelhead.

Mr. SLAVIN. You are dealing with packers only, and it is a higher echelon of the receivers that you are selling to. Receivers in our industry have to extend credit anywhere up to 3 to 6 weeks. There is no way in which they can survive paying their bills in cash and banking their customers for a period of 3 to 6 weeks. Any attempt on our part to do that would be a violation of the antitrust laws. Any violation of growers cooperatives that do that would be exempt from the antitrust laws.

Senator MELCHER. I have heard this argument for 34 years. You can have buyers cooperatives. IGA does a magnificent job of having a buyers cooperative and they are making money doing it. So if the left shoe is a grower, the producer, and the right shoe is a buyer, both sides are wide open. The law is right there; available for cooperatives on each end.

Mr. SLAVIN. Except that in our business practice they do not exist.

Senator MELCHER. They do in the case of IGA. They are a pretty big business.

That is all I have, Mr. Chairman.

Mr. SLAVIN. I would again stress that the act would be more pallatable to us if it simply contained a provision which would say that these moneys need not be segregated. I understand that, at least from what has been touted around the country, that is what the intention of the statute is. If that is what the intention is, why not say it?

Senator COCHRAN. Mr. Slavin, to what do you attribute the trend that we have heard discussed this morning, the trend toward slow pay, and bankruptcies, and insolvencies that plague the industry?

Mr. SLAVIN. Sir, the whole country is in the throes of that type of thing. We are just beginning to come out of it. You have had increased bankruptcies in every field. You have had increased failures in every field. You have had increased slow pay in every field.

I think people in agriculture, on all ends of it, will be like everybody else in the country. As we recover, you will find payments are better, less bankruptcies and so on. I can only go by my experience, which is not a small one. In the world's biggest market, in which I function, the number of bankruptcies have been very small. And in those situations in which bankruptcies have existed, at least 50 percent of them have been caused by a disregard of basic and sensible credit practice. If I could give you examples, I could sit here all day and do it, and you would not believe it.

[Senator Melcher leaves the hearing room.]

Senator COCHRAN. Your idea is we can best respond to that problem by having more efficient enforcement of current law rather than enacting a new law?

Mr. SLAVIN. I must tell you that I have the highest and greatest respect for the regulatory branch of the Department of Agriculture, and for the work they do. You cannot do more than you are paid to do, at least have the money available to help you do. I

think if you took that $450,000 and you put it to work enforcing your existing law, you would accomplish a lot more than you will with this act. I think in most cases you are going to end up with an empty trust anyway. You are going to have a trust but no property in the trust. And I think you will find a tremendous disregard and lack of knowledge by the buyers of these trust provisions.

Senator COCHRAN. Well, you have been very helpful to the committee in permitting us to hear a different point of view and to take a look at some alternatives to the current proposal. We appreciate your being here and providing the committee with your testimony and your statement. Thank you very much, Mr. Slavin

Our last group of witnesses is a panel made up of Robert Jack Jenkins, who is executive secretary, North Carolina Yam Commission, Raleigh, N.C.; Jasper Hempel, vice president, governmental affairs, Western Growers Association, Newport Beach, Calif.; and John M. Himmelberg, representing the Florida Fruit & Vegetable Association.

Welcome to the hearing. I will ask Mr. Jenkins if you will proceed. Let me tell you that Senator Helms is very disappointed that he could not be here this morning to personally welcome you to the committee. He has a scheduling conflict and he did ask me to express his thanks to you for making him aware a number of months ago of need for trust protection legislation. And, of course, it is at his insistence that this hearing is being conducted this morning on the legislation.

I would ask you, if you would, to please proceed. We have copies of statements. They will be made part of the record in full. Please proceed.

STATEMENT OF ROBERT D. JENKINS, EXECUTIVE SECRETARY, NORTH CAROLINA YAM COMMISSION, RALEIGH, N.C.

Mr. JENKINS. Mine is going to be very short, sir, except to thank Senator Helms and thank you for the privilege of being here.[1] I do represent the North Carolina Yam Commission, which is located in Raleigh, N.C. And the Yam Commission is the industry association representing approximately 1,800 growers of sweet potatoes and approximately 60 shippers of sweet potatoes in the State of North Carolina. The Commission's membership is made up of growers, shippers, and processors; that is, canners and freezers of sweet potatoes.

I am pleased to have this opportunity to appear before the committee to testify in support of Senate bill 2052, this bill to amend the Perishable Agricultural Commodities Act by imposing a trust on the proceeds from the sales for the benefit of sellers.

Most of our 55 to 60 shippers in North Carolina are small by comparison to a lot of businesses, Mr. Chairman. As has been stated here so eloquently this morning, all business is a gamble. And it is like all the others, the harvesting, the packing, the growing of it, the shipping of it, is something that our growers constantly work with. I might point out that one thing that has not been mentioned here is that when it gets on the other end, they do not

[1] See p. 67 for the prepared statement of Mr. Jenkins.

have the vagaries of weather to participate in as the growers do. But we constantly have that in addition to the high cost of money in addition to trying to keep liquid cash in order to keep doing business as a grower and as a grower-shipper.

With the high costs of everything a grower-shipper puts into his commodity the returns are delayed until his crop is harvested and sold. That alone is bad enough. But if he sells it and after he makes a sale he is not able to collect his money, his cash flow is such that he may not be able to survive. And, as pointed out a few minutes ago by Senator Melcher, if the receiver on the other end pays cash for it, or pays within the time limit, then that would solve a great deal of the problem. But most of our grower-shippers are located—and we do ship about 60 percent of all the sweet potatoes in the United States from the State of North Carolina. We ship them nationwide, all over the United States and into Canada, Mr. Chairman. So our people make a lot of sales a long ways from home. It is hard for them to check out everyone they are selling to. So if they only sold to the ones who were an absolute 100-percent credit risk, they might not do as much business as they do. That is something with which they constantly deal.

Simply to say we believe if the same concept has worked—and, of course, I have been involved with United Fresh Fruit and Vegetable watching this develop, Mr. Chairman, and we believe this same concept would work for us. There is no point in me belaboring a lot of these points other than to say we support this act.

Senator COCHRAN. Thank you, Mr. Jenkins, very much for your statement.

I will now call on Jasper Hempel, representing the Western Growers Association.

STATEMENT OF JASPER E. HEMPEL, VICE PRESIDENT, GOVERNMENT AFFAIRS, WESTERN GROWERS ASSOCIATION, IRVINE, CALIF.

Mr. HEMPEL. Thank you very much, Mr. Chairman. I will attempt to be as brief as my colleague was. I am not sure I can do that, but I shall try.[1]

As you noted, I am Jasper Hempel. I represent the Western Growers Association. WGA has approximately 2,200 members, of which 1,100 are grower-shippers and packers of fresh fruits and vegetables in California and Arizona. Our members ship approximately 50 percent of the fresh fruits and vegetables consumed in the United States.

We have encouraged the introduction of, and wholeheartedly support, S. 2052. We appreciate the opportunity to be here and express our opinion.

To understand part of our problem, I believe it would be instructive to explain how fresh fruit and vegetable sales are made, and I will do that very briefly. It has already been alluded to that literally all sales of fresh fruits and vegetables are done over the telephone, done verbally, and the sales are done on "a-man's-word-is-his-bond" basis. There are no written contracts, generally. The

[1] See p. 69 for the prepared statement of Mr. Hempel.

actual sales negotiations, the contract is done generally over a 2 or 3 minute brief telephone conversation, where the market demand is discussed, where the quality of the product that is to be sold is discussed, and then some bargaining over what the price is. Oftentimes buyers do not give much leeway in terms of what the ultimate price is, but you work it out. As a seller, you work it out with the buyer what that price is.

As I have indicated, that is all done verbally. We do not have any followup documents—excuse me, we do have followup documents in terms of invoices, but we do not have any written contracts that specify the terms of sale at the time the sale is made.

We have to rely on the buyer's solvency. We have to rely on his past practices, and we do resort to various credit reporting agencies in reviewing whether or not the buyer is solvent. So you can see sellers of fresh fruits and vegetables are extremely vulnerable when selling to buyers of those products. As unsecured creditors, our members cannot apply all of the same bargaining leverage normally afforded secured creditors in like situations. In fact, unlike most other commercial transactions today, our fresh fruit and vegetable products are sold, shipped, and consumed within days, often before the buyers receive an invoice for those products from our sellers, as John Norton alluded to earlier. However, also a point that must be stressed is that, unlike most commercial transactions where tangible assets can be repossessed, we have no tangible assets that we can hang onto should a buyer, a slow payer, or a no payer default. Therefore, we believe that the fresh fruit and vegetable industry should be treated virtually like every other industry in the United States, and this trust plan will provide us the protection that we so desperately need.

The Western Growers Association has a marketing claims department which does nothing but handle slow pay and no pay cases, and insolvencies for our seller members. And I would just like to briefly go through our history of those cases.

The way we keep our records is not on the amount of money that is at issue, but, rather, on the amount of money that we return to our members through settling these various disputes.

In 1977, for example, we opened 451 cases for our members. We closed or resolved in 1977, 403 cases and returned approximately $750,000 to our members.

By contrast, in 1982, a 5-year period, we opened 842 cases; closed 560 cases and returned $2,038,000 to our members.

In 1983, we are looking at opening 900 cases. We have already returned $1.7 million and we anticipate returning to our members a total of $2.2 million. So you can see that over the span of the last 5 years our losses, or the amount of dollars at issue for no pay, slow pay, and insolvencies have doubled.

By way of further example, in 1982, our members lost $2.3 million, unrecoverable dollars, to 16 insolvent buyers. And I do not mean to take issue with Mr. Slavin, but we do not regard 16 insolvencies in 1 year as being on two hands, and we believe it to be a very significant number.

In conclusion, I would like to make two very brief additional points, Mr. Chairman. One is with respect to the funding issue. As you are aware, the PACA is funded entirely by the industry. We

pay for it through license fees. It is not something that the Government pays for us. The overwhelming majority of the industry wants the trust. We are willing to pay for it, We are willing to pay the extra $20 a year that it would take to put the plan into effect.

The other thing that I would like to stress is with regards to the segregation of the trust funds. I am a lawyer. I do not admit to it most often, but in a plain reading of the *Gotham* case, anybody who reads the *Gotham* case, on its face, will see that there is absolutely no segregation requirement. But, as reasonable minds will differ, so will reasonable lawyers, and while I appreciate and respect Mr. Slavin's position, I do not agree that that is the state of the law. There simply is no segregation requirement.

Thank you very much.

Senator COCHRAN. Thank you for the testimony.

I can tell you are not John Himmelberg.

Ms. MATHEIS. I was going to start with that, Mr. Chairman.

I am Cheryl Matheis. I am substituting for John Himmelberg.[1]

Senator COCHRAN. Welcome.

STATEMENT OF CHERYL MATHEIS, REPRESENTING JOHN HIMMELBERG, FLORIDA FRUIT AND VEGETABLE ASSOCIATION, ORLANDO, FLA.

Ms. MATHEIS. It is good to be here today.

I want to thank you for the opportunity to present the views of the Florida Fruit and Vegetable Association to this committee.

FFVA is an agricultural trade and service organization with substantial memberships in the State of Florida among growers and shippers of fresh vegetables, tropical fruits, sugarcane, and citrus.

Our members include both those who grow and ship their own produce and those who ship produce grown by others.

FFVA strongly supports the proposed amendment to the Perishable Agricultural Commodities Act, which would create a statutory or constructive trust in favor of the seller on the inventory or proceeds from resale in possession of the buyer.

The arguments in favor of this position have been well stated by the witnesses who preceded me. So what I would like to do is depart from my prepared text and just make a few observations that occurred to me as I was listening to the other witnesses.

I think, with due respect to the opposition that was expressed, this is a simple provision which is easily administered and provides much needed teeth to the PACA.

First of all, there is no need for the buyer to separately segregate funds, or to take any action beyond that which is already required by law; namely, in most instances, to pay within 10 days of receipt of the goods. The burden is wholly on the seller who wishes to enforce the trust provisions and notify the Department of Agriculture if payment has not been made. At that point, the Department of Agriculture has stated that it intends to informally contact the buyer and attempt to resolve the problem. Only then, if all of the preceding things have not worked out, do the trust provisions come into play. At that point, the USDA does have the opportunity to go

[1] See p. 74 for the prepared statement of Mr. Himmelberg.

into court on behalf of a seller, if necessary to preserve the trust assets.

It has been stated that the necessity for USDA to go into court to take this issue of injunction would be rare. And I would agree, based on our association, that it would be rare. But the problem is that when it is necessary, it is absolutely necessary for the economic well-being of the producer.

Mr. Slavin mentioned that the funds would better be spent enforcing the PACA as it now exists. I would say that this is not a normal business. As everyone stated, this is not run like a normal business and that was the reason the PACA was necessary in the first place.

There is not economic power between buyers and sellers. I believe that sellers outnumber buyers at this point 15 to 1. So a seller cannot just go to the buyer and say, "You will agree to my provision. You will pay me when you get these goods." There are other sellers to go to, and that is the gist of this. The fact that there may be more bankruptcies in this economy is all the more reason for this provision. I think this provision is simple. The fact that there may not be a lot of bankruptcies—I have been practicing law for 5 years—the first thing that I dealt with in the agricultural industry was a bankruptcy problem where our grower had sent off his goods to someone who went bankrupt and he lost out. It does not happen often, but it happens. And this will not be a difficult provision to enforce. As was stated, the industry pays for the enforcement of it, and I think it is overwhelmingly supported by the industry, at least by the Florida producers.

Thank you.

Senator COCHRAN. Thank you very much.

I think your testimony has been very helpful. At least, it has helped me personally to understand the issues that are involved and the goal of the legislation that it seeks to achieve.

Your statements have been very thoughtfully prepared and we appreciate that very much. I do not have any questions for you. If we do have questions that develop as we review the material, we may submit questions to you in writing and ask that you respond to those, for which we would be very grateful.

This concludes this hearing and I want to thank all of the witnesses who participated. It has been a very helpful effort that we have made today to try to determine whether or not S. 2052 is needed and, if so, what the impact of it will be on the industry and in the economy generally.

Thank you all for participating.

[Whereupon, at 11:55 a.m., the subcommittee adjourned, subject to call of the Chair.]

APPENDIX

Statement of Vern F. Highley, Administrator, Agricultural Marketing Service, U.S. Department of Agriculture

My name is Vern F. Highley. I am Administrator of the Agricultural Marketing Service. With me today is John J. Gardner, Chief of our Fruit and Vegetable Division's Regulatory Branch and who is responsible for the day-to-day administration of the Perishable Agricultural Commodities Act. Also with me are John C. Chernauskas and Dennis Becker, Assistant General Counsel of the Department's Office of the General Counsel.

We appreciate the opportunity to appear before your Committee today to present the views of the Department of Agriculture on H.R. 3867, a bill to amend the provisions of the Perishable Agricultural Commodities Act, 1930: To establish payment and trust requirements to insure prompt payment to supplier-sellers by receivers and buyers of fruits and vegetables.

The Department strongly recommends that H.R. 3867 be passed.

The purpose of the Perishable Agricultural Commodities Act (PACA) is to suppress unfair and fraudulent practices in the marketing of fresh and frozen fruits and vegetables and cherries in brine in interstate and foreign commerce. For this purpose, the Act establishes a code of fair play in the marketplace and provides aid to traders in the enforcement of contracts for marketing these commodities. The fruit and vegetable industry is a vital element in the nation's economy. As the nutritional value of these commodities has become better known, per capita consumption

has increased. During 1982, the consumer paid approximately $63 billion for domestically grown fruits and vegetables. The farmers' share of this total was approximately $14 billion. The $49 billion marketing bill--which included secondary trading earnings, transportation, refrigeration, and other service costs--amounted to 77 percent of the dollars paid by consumers.

The fruit and vegetable industry is made up of approximately 220,000 fruit and vegetable farmers who market their crops through 15,000 licensed trading firms made up of approximately 200,000 individuals. The majority of the firms involved are small business operations. Producer-marketers outnumber buyers by fifteen to one. The need for the PACA code of fair play is accentuated. Payment for goods and services must be timely made to assure an uninterrupted flow of food to the consumer, and a prompt turn-around return of earnings to the grower and other sellers in the marketing chain. The production and marketing cycles can then repeat without unwarranted interruption.

The fruit and vegetable market is most sensitive, responding quickly and sometimes extremely to changes in supply and demand. Similarly, when the flow of payment for fruit and vegetables is interrupted by slow pay or business failures, a domino effect along the supply chain reflects increased losses. Historically, the industry has operated informally with large amounts of commodities being committed and shipped on a good faith basis. In general, there are no written contracts and the buyer does not see the product before shipment. Because the commodities are perishable and distances to markets are great, sellers are under pressure to dispose of tonnage as rapidly as possible, particularly before buyers switch their purchasing activities to other commodities or new producing areas. Since trading agreements are primarily verbal rather than written, there are frequent misunderstandings and a continuing vulnerability to deception and fraud. The PACA has brought stability to the

marketplace by protecting trading against persons who engage in unfair and fraudulent practices.

Fair trading under the PACA requires traders to comply with the terms of their contracts. Sellers must ship the quantity and quality of produce specified. Buyers must accept shipments that meet contract terms and pay promptly after acceptance. Prompt payment for purchases means within ten days unless there is a prior agreement between buyer and seller setting a different time in which payment will be due. Within these broad parameters of fair trading, specific unfair practices are spelled out:

1. Failure by the seller to deliver produce sold or contracted to be sold.

2. Rejection of the produce without reasonable cause by the buyer.

3. Failure to pay promptly the agreed upon price for produce.

4. Misrepresenting the grade, quality, quantity, weight, or origin of the commodities.

Commission merchants, brokers, and dealers, including certain retailers and processors must be licensed. Licenses are the key to enforcement of the fair trading practices. They are also the tool of the trader in the marketplace. Through operation of the code of fair play he receives protection and the means to make good contracts and/or to quickly resolve contract disputes between him and his customer.

Acting on statutory authority, the Secretary has established a forum for hearing the approximately 3,000 damage claims filed each year concerning disputes about contract performance by traders. Settlements negotiated by USDA dispose of seventy-five

percent of these claims. Twenty-five percent are disposed of by formal proceedings. The service of resolving damage claims speedily is vital to the industry and to the consumer. It reduces the cost of doing business by eliminating the prohibitive expense of pursuing claims to recover payment for produce through courts which have overloaded dockets which are located thousands of miles from the injured person. A direct benefit accrues to the consumer when buyers and sellers observe the code of fair play and utilize the national forum to resolve contract problems. We receive and dispose of approximately 28,000 requests a year asking for counseling relating to contract performance of traders. It is estimated that without the PACA forum, an additional 10 percent would be added to the consumer's purchase price as a result of price markups to offset against no-pay risks without offsetting benefit of service or quality of product.

The PACA has served its purpose well. The effectiveness of an established code of fair trading in promoting orderly marketing has been recognized as an outstanding example of cooperation between industry and government that achieves a worthwhile purpose. Costs of program administration, except for the small amount necessary for legal support services, are paid from the PACA fund which is made up of license fees paid by commission merchants, dealers, and brokers.

A prime reason for the PACA ability to smooth marketing bumps is that its administration and the statutory provisions have been adjusted to meet the needs of the marketplace. An ongoing program to educate traders on how to use the PACA and its regulations as a marketing tool enables them to avoid contract problems. The counseling service, which applies fair trading principles to actual contract situations, helps buyers and sellers to avoid problems or to resolve them speedily. Disputes that get out of hand can slow or even halt the disposition of the commodity, and result in a loss to the buyer, the seller, and the

consumer. Orderly marketing is good business for everyone; it requires assurance that commodities be delivered without interruption and paid for promptly.

Three new problems which reflect changes in the industry's financial picture currently threaten the industry. They add an abnormal marketing risk burden against which sellers are unable to protect themselves.

1. Hidden security agreements which encumber liquid assets of buyers and divert money due to suppliers for fruits and vegetables away from the suppliers.

2. Climbing overhead costs including costs of debt servicing which impact trading and are reflected by a marked increase in slow pay.

3. A steady increase in business failures and bankruptcy losses with no possibility of meaningful recovery because assets are diverted away from fruit and vegetable creditors and into the the hands of secured interest holders.

Most business failures today mean a total loss to fruit and vegetable suppliers. By the time they learn that a customer has closed its doors, available funds have been diverted to secured interest holders. A recovery of as much as 10 cents on a dollar is unusual. PACA experience reflects the impact of these burdensome factors. During Fiscal Year 1982, reported losses due to slow pay and no pay aggregated approximately $32 million. Reported business failures and bankruptcies reflected losses of another approximate $32 million. The same situation continued into Fiscal Year 1983. Most firms in the fruit and vegetable industry are small businesses which cannot withstand severe losses. Too frequently because the domino effect prevails, they join the ranks of the business failures.

The Secretary is currently without the authority to deal with these problems meaningfully. As presently constructed, the PACA addresses the problems of prompt pay and no pay indirectly. The statute defines unfair practices and authorizes the withdrawal of a trading license for repeated or flagrant violations. Encouraging prompt pay and a system which requires the availability of liquid assets earmarked to pay produce obligations could overcome the payment problems.

The proposed amendments to the PACA would complement the code of fair play since they are specifically directed at insuring prompt payment to producers and other sellers. The core provisions of the bill are:

1. The determination that there is a burden on commerce in perishable agricultural commodities caused by financing arrangements under which commission merchants, dealers, and brokers who have not made payment for fruits and vegetables as required by their contracts encumber or give lenders security interest in the commodities or on inventories, receivables, or proceeds from food or other products derived from the commodities and that such arrangements are contrary to the public interest.

2. The requirement that commission merchants, dealers, and brokers hold in trust fruit and vegetable inventory receivables due and proceeds from the sale of food or other products derived therefrom for the benefit of unpaid suppliers, sellers, or agents until full payment has been received by them.

3. The requirement that a trust participant who has not received timely payment for produce act to preserve its right to trust benefits by filing written notice with the debtor and notice with the Secretary.

4. The determination that it is an unfair practice to fail to maintain the required trust.

5. Authority for the district courts of the United States to entertain actions by trust beneficiaries to enforce payment from the trust and actions by the Secretary to prevent and restrain dissipation of the trust.

6. That the trust provisions will not apply to transactions between agricultural cooperative associations and their members.

Since the trust impressed by 5(c)2 is made up of all of a firm's commodity related liquid assets, a nonsegregated "floating trust" which permits the commingling of trust assets is appropriate and would give adequate protection to beneficiaries without creating an undue regulatory burden.

The proposed trust provisions which include the "nonsegregated floating trust" concept are closely patterned after the Packers and Stockyards Act, 1921, trust and prompt pay amendments which became effective in 1976. The Packer trust provision has operated very successfully without imposing a regulatory burden on the industry. A prime administrative asset is that the Packer trust and its administration have been upheld by the courts.

Enactment of this legislation will give the industry and the Department effective new tools to overcome the payment problems. However, they will not replace the need for sellers to exercise good business judgment by making necessary credit and trade rating checks before agreeing to ship goods to a buyer. Trust administration would require investigation of notices filed to preserve trust benefits since the filing by the unpaid person is to be done after the receiver has defaulted on its payment

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agreement. When firms are using trust monies for other purposes and not paying for produce, they will be given warnings and an opportunity to bring themselves into compliance. Continued dissipation of trust funds would be flagrant violations and cause for a suspension or revocation of the PACA license. The Secretary will also have the authority to initiate court action to freeze trust assets until unpaid produce sellers have had the opportunity to protect their interests.

The use of these tools in a cooperative effort by industry and USDA would go far toward eliminating the undue risk burdens fruit and vegetable supplier-sellers now face. Benefits from the legislation would accrue to all segments of the industry since every buyer after the farmer-producer, except the retailer, is also a wholesaler who would have trust protection when reselling the merchandise. Retailers who sell to consumers are not faced with the same pay problems as the remainder of the industry since they receive cash payment from consumer-customers. Industry sources report fruit and vegetables represent eight percent of the retailers' gross sales and are one of the best and most profitable items sold. Retailers recognize that adequate supplies of fruit and vegetables require that all buyers must pay promptly. When retailer competitors pay promptly, the suppliers' risks are reduced which may increase sales and lower prices to consumers. The prompt pay and trust provisions would apply to all firms who are licensed to trade under the PACA and to all firms who operate a fruit and vegetable business that require that they be licensed but who have not obtained a license.

The protection provided by the legislation would be of immediate benefit to fruit and vegetable trading. A resulting turn-around domino effect would follow bringing timely payment of earnings to traders along the marketing chain and to the farmer. This is a particularly significant benefit since commodities are usually traded two and three times enroute to the consumer. Also, when

there is financial difficulty such as a business failure or bankruptcy, the trust assets earmarked for payment of produce debts would accrue to unpaid fruit and vegetable sellers rather than to creditors who hold a secured interest position. Based on PACA experience, the prompt pay and trust arrangements would conservatively result in a recovery of the known $65 million annually which is presently lost by the industry. PACA would become a much more effective and helpful tool. For example, during Fiscal Year 1982, the Department was responsible for recovery of approximately $16 million in settlements through existing procedure. However, for every dollar collected, at least $4 of debt was lost to the industry because assets of defaulting firms were diverted into other channels. With the proposed legislation in place, total recovery of money for fruit and vegetable sellers would increase five times. Not only would pay practices improve, but industry business failures should decline.

The right of an injured person to pursue a claim for damages resulting from a breach of contract before the Secretary will remain unchanged. Enactment of the bill would add court action by an unpaid seller as a means of recovering payment from trust assets. All other rights to PACA benefits would remain in place. Administration of the prompt pay and trust provisions will be blended with the current activities of overseeing the operation of the code of fair play in trading. Because fair play in trading is the overall objective, the activities will complement one another with information and findings in each activity area being used to assist administration in other areas. The basic necessary operations and interpretations relating to the prompt pay and trust provisions are contained in the addendum portion of this testimony attached.

Our PACA personnel are in daily close working contact with the industry. Trained core personnel are in place ready to begin

program operations if the bill is enacted. New personnel will be trained and added until a working staff of seven marketing specialists and five clerical persons is carrying out the program.

Present license fee authority is adequate to permit funding to carry out the responsibilities which would accrue with enactment of this legislation as well as program funding for current activities through Fiscal Year 1985. License fees can be adjusted as necessary to maintain the program administration. First year costs of administering the provisions of H.R. 3867 are projected at $450,000.

Mr. Chairman, this concludes my statement. My associates and I will be happy to respond to questions from the Committee.

ADDENDUM TO TESTIMONY OF VERN F. HIGHLEY
PLANNED TRUST OPERATION--ADMINISTRATION

Sec. 5(c)2 impresses a trust on "perishable agricultural commodities received by a commission merchant, dealer, or broker, in all transactions, and all product inventory, receivables, and proceeds from food or other products derived from perishable agricultural commodities . . . for the benefit of all unpaid suppliers or sellers of such commodities or agents involved in the transaction, until full payment" has been made.

Since the trust impressed by 5(c)2 is made up of all of a firm's commodity related liquid assets, a nonsegregated "floating trust" which permits the commingling of trust assets is appropriate and would give adequate protection to beneficiaries without creating an undue regulatory burden.

For trust purposes, there should be no necessity to specifically identify all of the trust assets through each step of the asset accrual and disposal process. Therefore, we see no current need to change present PACA record-keeping requirements. Since commingling is contemplated, all trust assets would be subject to the claims of unpaid seller-suppliers and agents to the extent of the amount owed them. Beneficiary claimants have the responsibility of establishing the details of the transaction on which payment is sought. Ordinary business records will reflect receipt and disposition of the goods.

Operation

The trust impressed by 5(c)2 is a so-called "floating trust". As each supplier, seller, or agent gives ownership, possession, or control of perishable agricultural commodities to a commission merchant, dealer, or broker, such supplier, seller, or agent will

automatically become a participant in the trust. Trust participants who file to preserve their right to benefits remain trust beneficiaries until they have received payment in full. When produce shipments are paid for or trust assets are liquidated, the amount of the trust will be reduced. Likewise, the receipt of new shipments adds to trust assets. Trust assets may be commingled with other assets of the receiving business entity, and may be traced into the resulting constructive trust. This concept is tailored after that which was upheld in the case of In re: Gotham Provision Co., Inc., The First State Bank of Miami v. Gotham Provision Co. Inc., 669 F.2d 1000 (5th Cir., 1982). The purpose of the trust is to assure that all business entities along the chain of supply from the producer receive prompt payment for their goods and assurance that they will not be deprived of being paid by the receiver because liens have been placed on the goods or receivables for the benefit of other creditors. It is important to recognize that everyone along the marketing chain that buys produce becomes in turn a supplier-seller and that its fruit and vegetable transactions with commission merchants, dealers, and brokers would come under the trust provision.

Duration

The trust will continue until full payment of the money owing in connection with fruit and vegetable transactions has been received by unpaid supplier, seller, and broker trust beneficiaries.

Recovery

Under 5(c)3, the supplier becomes eligible to proceed with action to recover under the trust when the buyer fails to make payment for goods received within the agreed upon time. To preserve his right to trust benefits, the supplier-seller must give a written notice to the debtor and file notice with the Secretary within 30 business days after the date payment was due or the date when it was notified that a payment instrument was dishonored. Regulations currently in effect under the Act define prompt payment as used in the statute. These regulations reflect long-standing industry practice. They provide that the prompt payment requirement will be met if payment is made within the time agreed upon by the parties at the time they make their contract. The regulations also specify time periods within which payment must be made to be considered prompt payment under the various types of trading contracts which will apply if the parties have not agreed to a negotiated different time. Trust provisions require that the parties who agree upon a time other than the one stated in the regulations reduce their agreement to writing before entering into the transaction and insure that documents reflect the terms agreed upon.

Administration

The Secretary will preserve the notice filed under the 5(c)3 requirement for the time necessary to assure that the records will establish the date of filing and for other administrative purposes within the Department or in court proceedings. The Secretary will investigate the circumstances in response to each notice filed and endeavor to obtain payment of the past due money. Where appropriate, an audit of the debtor's records will be made to determine whether the trust is being maintained and the amount owed each supplier-seller. Except where the violations are repeated or flagrant, an opportunity will be afforded the defaulting receiver to bring itself into compliance with all trust requirements. Where necessary, court action will be instituted to restrain a receiver against the dissipation of trust assets.

All known unpaid supplier-sellers in transactions on which the receivers are in default will be advised of the statutory trust so they can preserve their right to participate by filing timely notice to protect their rights to benefits. When, in the Secretary's opinion, the financial condition of a firm is such as to indicate a possible business failure or that trust assets are being dissipated, all known unpaid supplier-sellers will be informed so they can protect their rights to trust benefits. Audit findings will be available for use in court proceedings initiated by unpaid sellers to obtain payment from trust funds, in bankruptcy court, and in court actions initiated by the Secretary to prevent dissipation of trust assets.

Recovery

Unpaid supplier-seller beneficiaries who have preserved their right to trust benefits may file claims in the district courts of the United States requesting payment from trust funds of past due and unpaid monies owed in connection with fruit and vegetable transactions.

The ability to recover damages due in connetion with fruit and vegetable transactions by petition to district courts of the United States for an award of trust funds is in addition to existing remedies under the Act including reparation proceedings before the Secretary, court actions, or other existing remedies.

Financing

The thrust of the 5(c)2 provisions is to assure prompt payment for fruits and vegetables, and to establish a trust requiring accrual of assets designated to pay produce suppliers.

The trust provisions should not adversely affect but should rather assist in making financial arrangements since they establish a system to assure prompt payment for asset generating raw product.

Statutory trust requirements will be known to and considered by prospective lenders. They will be factored into the formula for arriving at the loan agreement. Obviously, lenders will negotiate to protect against loss. They will also stir into the mix the assurance the trust provision gives that raw products will be paid for promptly and that there is a monitoring system. The procedure will protect the interests of the borrower, the money lender, and the fruit and vegetable industry. Prompt payment generates trade confidence and new business which yields increased cash and receivables, the prime security factors to the money lender.

Effective Date

The slow pay-no pay problems are sufficiently severe to warrant the conclusion that the public interest would best be served if the legislation became effective on enactment and that existing security interest transactions became subject to the trust provisions upon enactment. National interest in the proposed legislation has been intense. Trade associations and trade press are giving front page coverage informing everyone interested, from the farmer-seller to receivers of all consideration and status of the legislation. To be doubly sure that nobody will be disadvantaged because of a lack of information, the Agricultural Marketing Service will also take positive steps to keep all interested parties fully advised of the new statutory trust requirement and its ramifications.

Trust Maintenance--Section 2 Administration

When the Secretary receives notice that goods have not been paid for, he will take the necessary action to protect the unpaid supplier. Alternatively, he may, where circumstances warrant, conduct an investigation of the receiver's business records in accordance with Sections 6, 9, and 13 of the Act, and determine whether the trust is being maintained and the names of unpaid suppliers.

When investigation reveals the trust is being dissipated, each unpaid supplier-seller will be informed so that it will be able to protect its statutory trust rights. Except where violations are repeated or flagrant, the firm will be given a written warning and an opportunity to bring itself into compliance. Follow-up audits will be made after the warning is given to determine whether the firm has ceased the dissipation and achieved compliance with statutory requirements. If a firm persists in trust dissipation, the Secretary will initiate an action in the U.S. District Court to restrain against dissipation of trust assets. In cases of repeated or flagrant violations, the Secretary will consider institution of disciplinary action to suspend or revoke the firm's trading license. When USDA is informed that a PACA licensee's business is being terminated, dissolved, assigned, sold, or that it is a debtor in bankruptcy, effort will be made to arrange payment to sellers informally. Also, any courts involved will be advised of the statutory trust requirement and will be furnished with all available information.

Court Action

Section 5c(4) empowers the Secretary to take action necessary to prevent and restrain dissipation of the trust. Such actions would be in the form of seeking injunctive relief, including the use of temporary restraining orders and preliminary injunctions in the bankruptcy courts and district courts of the United States. This authority is essential to assure that there are sufficient tools to enable the Secretary to move expeditiously when it has been determined that a receiver is failing to maintain the required trust, is dissipating trust assets or is in financial difficulty. The Secretary will act for the benefit of suppliers by going into court and securing an order which will prevent the dissipation of assets that make up the floating trust.

When a business is in financial difficulty, security interest holders move quickly to collect on their money because they are aware of the plight of the borrower. Suppliers of produce cannot protect their interests because they lack the necessary information and are usually many miles away. Once funds are dissipated, it is all but impossible to effect recovery. Since the Secretary lacks jurisdiction over persons which are not subject to license, the trust requirement would be rendered virtually unenforceable without the authority to act on behalf of produce suppliers to freeze a receiver's trust assets until the produce creditors have been apprised of the situation and have had opportunity to protect their interests.

It is contemplated that the Secretary will have a sufficient basis, cognizable by the courts, on which to seek injunctive relief whenever it has been determined that there are unpaid transactions and the total amount not paid is more than $25,000. Where the amount of funds in the trust is insufficient to cover all unpaid produce supplier obligations, the court will be asked to order a pro-rata distribution of trust assets to those suppliers which file valid claims.

As used in 5(c)2, "received" means the time when the buyer,

receiver, or agent gains ownership, control over, or possession of the goods. The industry has long operated under standardized trade terms which define contract responsibilities. These contract terms are included as regulations under the Act and will be considered as criterion in determining when goods are "received".

The words "calendar days" as used in 5(c)3 mean every day of the week, including Saturdays, Sundays, and holidays, except that if the thirtieth business day falls on a Saturday, Sunday, or holiday, the final day with respect to the time for filing a written notice of intent to preserve the benefit of the trust would be the next day upon which there is postal delivery service.

STATEMENT

OF

BERNARD J. IMMING

PRESIDENT

UNITED FRESH FRUIT AND VEGETABLE ASSOCIATION

My name is Bernard Imming, President of the United Fresh Fruit and Vegetable Association with headquarters in Alexandria, Virginia. United is the national trade association of the fresh fruit and vegetable industry. Its 2,600 member companies handle over 80% of the fresh produce commercially marketed. United's membership comprises all factors in the industry including growers, shippers, wholesalers, and retailers.

I am pleased to have this opportunity to appear before the subcommittee to testify in support of a bill to amend the Perishable Agricultural Commodities Act by impressing a trust on perishable commodities and proceeds from sale thereof for the benefit of unpaid sellers. United has spearheaded the development of industry policy on this issue. It became apparent over the last several years that one of the most urgent problems facing the entire industry was the increasing frequency of devastating losses suffered by produce sellers due to the financial difficulties of some large customers.

Producers and shippers of perishable commodities are, for the most part, small sized businesses. The process of growing, harvesting, packing and shipping perishables is a real gamble. Costs are high, capital is tied up in farm land and machinery and returns are delayed until the crop is sold. If the grower-shipper cannot realize any returns on the sale of the crop immediately, he may not be able to survive. Thus, where bankruptcies or reorganizations occur, the growers are

USUALLY THE PARTIES LEAST ABLE TO WITHSTAND THE LOSSES AND INEVITABLE DELAYS WHICH RESULT FROM SUCH ACTIONS.

THESE PROBLEMS ARE SIMILAR TO THE ONES FACED BY THE LIVESTOCK INDUSTRY IN 1976 WHEN AN AMENDMENT VERY SIMILAR TO THIS WAS ADDED TO THE PACKERS AND STOCKYARDS ACT. AS IN THE LIVESTOCK AND MEAT INDUSTRY, COMMERCIAL PRACTICES HAVE DEVELOPED OVER THE YEARS WHEREBY TERMINAL DEALERS IN FRESH PRODUCE BORROW MONEY FROM LENDING AGENCIES PLEDGING THEIR INVENTORY AND ACCOUNTS RECEIVABLE AS SECURITY. IN OUR INDUSTRY, WE HAVE MANY GROWERS OF FRESH PRODUCE WHO ARE CONSTANTLY DEALING WITH CUSTOMERS LOCATED THOUSANDS OF MILES AWAY. THE NATURE OF FRESH PRODUCE IS SUCH THAT IT MUST BE MARKETED IMMEDIATELY UPON HARVESTING AND THUS, THERE IS NOT TIME TO ENTER INTO CREDIT CHECKS, NO MEANS OF STORING OR WAREHOUSING GOODS NEAR THE POINT OF SALE, AND NO REAL MEANS OF ASCERTAINING THE CURRENT FINANCIAL CONDITION OF THE MANY CUSTOMERS WE DEAL WITH EACH YEAR. IN OUR BUSINESS, THE OFTEN HEARD SLOGAN "SELL IT OR SMELL IT" IS MORE THAN A HUMOROUS PHRASE, IT IS AN ECONOMIC FACT OF LIFE. THIS IS THE FUNDAMENTAL PROBLEM IN PRODUCE DEALING WHICH WAS RECOGNIZED BY CONGRESS MANY YEARS AGO WHEN THE PERISHABLE AGRICULTURAL COMMODITIES ACT WAS FIRST PASSED.

NORMAL TERMS WITHIN THE INDUSTRY REQUIRE PAYMENT WITHIN TEN DAYS AFTER DELIVERY OF THE PRODUCE ALTHOUGH THERE ARE MANY INSTANCES WHERE CREDIT IS ADVANCED WHICH ALLOWS ADDITIONAL TIME TO PAY FOR THE SHIPMENT. AS IT NOW STANDS, AFTER DELIVERY OF THE PRODUCE TO THE TERMINAL OPERATOR THE LIENS ESTABLISHED BY THE CREDIT TRANSACTIONS WITH LENDING AGENCIES ATTACH AND THUS THE LENDING AGENCY STANDS AHEAD OF THE UNPAID SELLER IF THERE IS AN INSOLVENCY OR BANKRUPTCY PRIOR TO PAYMENT OF THE SELLER. IN OTHER WORDS, UNDER THE CREDIT ARRANGEMENTS WHICH ARE COMMON IN TODAY'S MARKET, THE BUYER IS ABLE

TO PASS A SECURITY INTEREST IN GOODS RECEIVED EVEN THOUGH HE HAS NOT PAID FOR THEM.

I WISH TO EMPHASIZE THAT WE ARE NOT HERE TRYING TO TAMPER WITH CREDIT LAWS OR REGULATIONS OR WITH PRIORITIES ESTABLISHED UNDER THE BANKRUPTCY LAWS. THOSE ARE COMPLEX STATUTES WHICH HAVE BEEN WORKED OUT AFTER YEARS OF EXPERIENCE AND AFTER MANY MONTHS OF HARD STUDY BY CONGRESSIONAL COMMITTEES. WE ARE TRYING TO ACCOMPLISH ONLY THAT WHICH THE CATTLEMEN DID WITH RESPECT TO THE MEAT PACKING INDUSTRY. WE WISH TO ESTABLISH A STATUTORY TRUST IN FAVOR OF THE UNPAID SELLER SO THAT THE PURCHASER OR DEALER, WHO IS LICENSED UNDER PACA, OR WHO IS SUBJECT TO LICENSE UNDER PACA, HOLDS THE SHIPMENT OF PRODUCE, OR PROCEEDS DERIVED THEREFROM, IN TRUST UNTIL THE SELLER IS PAID. IN OTHER WORDS, IT IS THE PURPOSE OF THIS AMENDMENT TO PREVENT THE DEALER FROM PASSING A SECURITY INTEREST IN THE PRODUCE SHIPMENTS RECEIVED BY HIM UNTIL THE SELLER HAS BEEN PAID.

OUR PURPOSE WAS TO SECURE AN AMENDMENT WHICH WOULD TRACK SECTION 206 OF THE PACKERS AND STOCKYARDS ACT AS CLOSELY AS POSSIBLE. THERE HAS BEEN ABOUT SEVEN YEARS EXPERIENCE WITH THAT PROVISION IN THAT INDUSTRY AND MOST OF THE LEGAL ISSUES HAVE BEEN IRONED OUT IN COURT DECISIONS. WHILE I AM NOT A LAWYER, I HAVE BEEN ADVISED BY COUNSEL FOR UNITED AND BY USDA THAT WE PRETTY MUCH KNOW WHERE WE STAND IN THE OPERATIONS OF THIS AMENDMENT AND, FOR THE MOST PART, THE ENTIRE INDUSTRY IS VERY COMFORTABLE WITH IT. WE HAVE WORKED CLOSELY WITH THE DEPARTMENT OF AGRICULTURE AND IT IS MY UNDERSTANDING THAT THEY BELIEVE THE PROVISION IS DESIRABLE AND WORKABLE, TOO.

THERE ARE SEVERAL FEATURES OF THE BILL THAT ARE WORTH COMMENTING ON. FIRST, UNLIKE THE PACKERS AND STOCKYARDS ACT, THIS TRUST PROVISION WILL APPLY WHEN CREDIT IS EXTENDED IN TRANSACTIONS BETWEEN A SELLER AND A DEALER. UNLIKE THE MEAT

PACKING INDUSTRY, IT IS COMMON PRACTICE IN THE PRODUCE BUSINESS TO EXTEND CREDIT FOR REASONABLE PERIODS OF TIME BEYOND THE TIME PRESCRIBED BY THE SECRETARY FOR PAYMENT IN "CASH" TRANSACTIONS. CONSEQUENTLY, TO BE EFFECTIVE, THE TRUST SHOULD APPLY TO THE CREDIT TRANSACTIONS AS WELL AS TO THE STRAIGHT CASH TRANSACTIONS WHICH MUST BE PAID WITHIN THE TIME PRESCRIBED BY THE SECRETARY. WE DISCUSSED THIS WITH THE DEPARTMENT OF AGRICULTURE AND IT IS MY UNDERSTANDING THE DEPARTMENT AGREES WITH US.

SECOND, THERE ARE NUMEROUS TRANSACTIONS IN THE PRODUCE INDUSTRY WHICH INVOLVE COOPERATIVES. THUS, GROWER MEMBERS OF A MARKETING COOPERATIVE ENTER INTO TRANSACTIONS WITH THE CO-OP WHICH THEN PERFORMS THE MARKETING FUNCTION FOR THE GROWER MEMBERS. WE DON'T BELIEVE MEMBERS OF COOPERATIVES NEED OR WANT ANY PROTECTION IN DEALING WITH THEIR OWN CO-OP. THESE ARE ESSENTIALLY IN-HOUSE TRANSACTIONS WHERE THE DIFFICULTIES I HAVE DESCRIBED IN NORMAL COMMERCIAL DEALINGS IN THE PRODUCE INDUSTRY DO NOT EXIST. OUR DESIRE IS TO LIMIT THE APPLICATION OF THE TRUST TO SITUATIONS WHERE IT IS NEEDED AND IT OBVIOUSLY ISN'T NEEDED IN THE CASE OF DEALINGS BETWEEN A CO-OP AND A MEMBER AND IN OTHER ARRANGEMENTS IN THE INDUSTRY THAT CAN BE CONSIDERED AS IN-HOUSE TRANSACTIONS. IT IS MY UNDERSTANDING THAT CO-OPS ARE VERY RARE IN THE MEAT INDUSTRY, IF INDEED ANY EXIST AT ALL. ON THE OTHER HAND, WE DO HAVE A NUMBER OF COOPERATIVE ORGANIZATIONS IN THE PRODUCE INDUSTRY AND WE THOUGHT, FOR CLARIFICATION, IT WOULD BE BETTER TO MAKE IT CLEAR THAT SUCH TRANSACTIONS ARE NOT COVERED. HERE AGAIN, THERE IS NO DISPUTE ABOUT THIS.

THIRD, THIS BILL AMENDS SECTION 2 OF THE PERISHABLE AGRICULTURAL COMMODITIES ACT MAKING IT AN UNFAIR PRACTICE FOR A DEALTER TO FAIL TO MAINTAIN THE TRUST. THIS WOULD EMPOWER THE SECRETARY OF AGRICULTURE TO STEP IN AND TAKE REMEDIAL

ACTION WHENEVER A REASONABLE BASIS EXISTED THAT THE DEALER DID NOT HAVE SUFFICIENT ASSETS IN ITS POSSESSION TO COVER PAYMENTS DUE TO UNPAID SELLERS WHICH WERE PROTECTED BY THE TRUST. WE WANT TO MAKE IT CLEAR THAT IT WAS NEVER OUR INTENTION TO USE THE DEPARTMENT OF AGRICULTURE AS A COLLECTION AGENCY FOR SELLERS OF FRESH PRODUCE. ALL WE WANT IS LEGISLATION WHICH WILL ENABLE US TO PROTECT OURSELVES. IN FACT, I WAS ADVISED THAT THE SECRETARY NOW HAS THE POWER TO INSTITUTE PROCEEDINGS AGAINST A LICENSEE WHO FAILS TO COMPLY WITH THE PROMPT PAYMENT PROVISIONS OF THE ACT AND THAT THE LANGUAGE AMENDING SECTION 2 OF PACA ADDS NOTHING SUBSTANTIVE BUT IS PRIMARILY FOR CLARIFICATION. HOWEVER, I KNOW THE DEPARTMENT OF AGRICULTURE, WHICH HAS THE RESPONSIBILITY FOR ADMINISTERING THE ACT, FEELS THE LANGUAGE IN SECTION 2 IS NECESSARY.

I AM, OF COURSE, ANXIOUS THAT THIS AMENDMENT BE WORKABLE AND I SUPORT ANY PROVISIONS WHICH THE DEPARTMENT FEELS ARE REQUIRED TO MAKE IT WORK. I AM ALSO CONCERNED THAT THIS PROVISION BE FAIR TO ALL SEGMENTS OF THE PERISHABLE INDUSTRY, INCLUDING THE DEALERS. IN MY OPINION, THIS AMENDMENT WILL BENEFIT THE ENTIRE INDUSTRY INCLUDING THE DEALERS WHO ARE ALSO OUR CUSTOMERS. THE TRUST PROTECTION WORKS FOR THEM ALSO. IN OUR INDUSTRY THERE ARE TRANSACTIONS BETWEEN DEALERS AND OTHER LICENSEES WHERE THE TRUST PROVISIONS WOULD BE APPLICABLE AND MOST OF THE DEALERS IN THE INDUSTRY SUPPORT THIS AMENDMENT.

THERE MAY BE SOME SENTIMENT EXPRESSED AGAINST THE SECTION 2 AMENDMENT BY SOME WITNESSES AND I HAVE ENCOURAGED THEM TO SPEAK THEIR MIND SINCE THAT IS WHAT THESE HEARINGS ARE FOR. WE WANT THE BEST POSSIBLE LEGISLATION TO ACCOMPLISH OUR OBJECTIVE. WE WERE ORIGINALLY OF THE MIND THAT THE SECTION 2 AMENDMENT WASN'T NEEDED AND WE DID NOT SEEK IT. SINCE THAT TIME WE HAVE BEEN CONVINCED THAT IT WILL NOT HURT THE

PRODUCE DEALERS AND WILL BE BENEFICIAL IN THAT IT REMOVES ANY UNCERTAINTY WHICH MAY EXIST REGARDING ACTION BY THE SECRETARY IN SITUATIONS WHERE IT BECOMES OBVIOUS THAT A DEALER'S ASSETS HAVE BEEN DIMINISHED TO THE POINT WHERE HE CAN'T COVER INVOICES OF THE UNPAID SELLERS.

WE HAVE AVOIDED ANY POSSIBILITY THAT WE WOULD BE DOING ANYTHING ADVERSE TO THE LENDING AGENCIES WHO ARE ALSO OUR PRINCIPAL ALLIES IN CONDUCTING BUSINESS. WE ARE NOT GETTING INTO PRIORITIES OR CHANGES IN THE UNIFORM COMMERCIAL CODE OR THE BANKRUPTCY LAWS. WE HAVE STAYED AWAY FROM ALL OF THAT AND HAVE NO DESIRE TO BECOME INVOLVED IN IT. CENTRAL TO OUR ENTIRE CONCEPT IS THAT THE TRUST RELATIONSHIP IS CREATED UPON POSSESSION OR CONTROL OF THE GOODS BY THE BUYER. IT WILL NOT CHANGE THE METHODS OF DOING BUSINESS BY EITHER THE SELLER OR THE BUYER.

AS IS THE CASE UNDER THE PACKERS AND STOCKYARDS ACT, THERE IS NO NECESSITY THAT TRUST PROPERTY BE SEGREGATED OR THAT ACCOUNTS BE MAINTAINED SEPARATELY. IN THE ORDINARY COURSE OF BUSINESS THE TRUST WILL BE OF VERY SHORT DURATION. IT IS EXTINGUISHED UPON PAYMENT TO THE SELLER. IF PAYMENT IS NOT MADE, THE SELLER IS OBLIGATED TO FILE A NOTICE OF INTENTION TO PRESERVE THE TRUST WITHIN THIRTY DAYS AFTER THE PAYMENT IS DUE. THERE WILL PROBABLY BE MANY INSTANCES WHEN THE SELLER WILL NOT FILE SUCH A NOTICE, PARTICULARLY IF HE IS DEALING WITH OLD AND TRUSTED ACCOUNTS AND SO THE TRUST WILL BE EXTINGUISHED BY FAILURE TO SEND THE REQUIRED NOTICE. ONLY IN THOSE INSTANCES WHERE THE NOTICE IS SENT WILL THE TRUST BE INVOKED AND THOSE WOULD NORMALLY BE WHEN THERE IS AN INSOLVENCY OR A BANKRUPTCY. THE SAME PRIORITIES AND CREDIT REGULATIONS ARE STILL APPLICABLE. ALL WE HAVE DONE IS TO DECLARE THAT THE PRODUCE SOLD TO A DEALER IS TRUST PROPERTY AND THUS THE DEALER CANNOT ENCUMBER IT UNTIL AFTER HE HAS

PAID FOR IT OR UNTIL THE TRUST HAS OTHERWISE BEEN TERMINATED.

I AM BRINGING THIS POINT UP BEFORE THE COMMITTEE BECAUSE WE HAD SOME DISCUSSIONS IN THE EARLY STAGES OF THIS PROJECT AS TO WHEN THE TRUST SHOULD ARISE AND THERE WERE SOME PEOPLE WHO THOUGHT THE TRUST SHOULD NOT BE CREATED UNTIL THERE IS AN INSOLVENCY. THIS, HOWEVER, WOULD NOT BE POSSIBLE UNLESS WE START CHANGING THE ESTABLISHED LIEN LAWS AND PRIORITIES WHICH HAVE BEEN SO PAINSTAKINGLY WORKED OUT AND WITH WHICH THE FINANCIAL INSTITUTIONS ARE FAMILIAR. CONSEQUENTLY, WE HAVE ADOPTED THE SAME CONCEPT OF SECTION 206 OF THE PACKERS AND STOCKYARDS ACT AND AVOIDED THE ISSUE ALTOGETHER. IT HAS WORKED WELL IN THE MEAT PACKING INDUSTRY AND WE BELIEVE IT WILL WORK WELL HERE. IT HAS SOLVED AN URGENT NEED FOR SAFETY AND STABILITY FOR PRODUCERS OF LIVESTOCK AND I BELIEVE THERE IS EVEN A GREATER URGENCY AND NEED FOR SECURITY AND STABILITY ON THE PART OF SELLERS OF FRESH PRODUCE COMMODITIES. ON BEHALF OF THE UNITED FRESH FRUIT AND VEGETABLE ASSOCIATION, THE TRADE ASSOCIATION REPRESENTING THE ENTIRE INDUSTRY, WE URGE THE SUBCOMMITTEE TO ACT FAVORABLY ON THIS LEGISLATION.

STATEMENT OF JOHN NORTON, CHAIRMAN, EXECUTIVE COMMITTEE
UNITED FRESH FRUIT AND VEGETABLE ASSOCIATION

Mr. Chairman and members of the Committee, my name if John Norton. I live in Phoenix, Arizona, and I am a grower, packer, and shipper of fresh fruits and vegetables. I am the Chairman of the Executive Committee of the United Fresh Fruit and Vegetable Association and formerly Chairman of the Board of the Western Growers Association. I hereby offer the following testimony today in support of a bill to amend the Perishable Agricultural Commodities Act by providing a trust protection plan.

The Perishable Agricultural Commodities Act (PACA) creates a program of rules and regulations intended to provide equity and prevent abuses in the conduct of interstate commerce in perishable fruits and vegetables. The marketing of perishable fruits and vegetables is among the most risky and complex marketing situations that exists. PACA has contributed immensely to orderly, responsible marketing practices for the benefit of the industry and the nation as a whole. It is our desire to amend the Act in order to improve its effectiveness and further the original goals.

Without the trading rules and licensing requirements of the Perishable Agricultural Commodities Act, our industry, of necessity, would have to return to the old "payment by sight draft prior to unloading" procedures. However, the PACA is, and has proven to be, an effective program which will continue to govern trading practices for our industry for the foreseeable future. Therefore, it is perfectly reasonable and desirable to review and amend the Act based upon new information, evolving marketing conditions, or the existence of unresolved inequities.

Growers and shippers who are sellers of fresh fruits and vegetables often face the problem of attempting to collect for their produce from an insolvent buyer. By the time the buyer or receiver becomes insolvent, a number of things have often occurred; namely, the buyer has been weak financially and over-extended in his credit relationships for some period of time. As a result, banks and lending agencies with whom he does business have already attached his accounts receivable and inventory and the furniture, fixtures, equipment and real property are often incumbered to levels which eliminate any equity. Therefore, it is commonplace for the

general or unsecured creditors to receive a very small percentage return after the secured creditors, banks, lending institutions, administrative fees, legal fees and trustee fees and court costs have consumed whatever asset value existed.

Under the present law, we who ship the fresh fruit and vegetables which often generate the total source of income potential for the insolvent firm, are on the bottom of the list as unsecured creditors. Produce which the buyer has not paid for provides or generates funds for the lender or banker to whom the accounts receivable are assigned. Fresh produce is a fast moving item and a financially distressed receiver can, in a few weeks time, receive thousands and thousands of dollars worth of fresh produce and in turn sell it to his customers thereby converting this inventory to accounts receivable very quickly. If all the accounts receivable have been collateralized as security for loans, then the secured lender will have precedence over all the unsecured suppliers of the produce. In effect, sellers who have supplied fresh produce commodities and have not been paid, have provided the equity capital for this buyer's business operations.

The livestock industry sought and obtained a similar amendment to the Packers and Stockyards Act in 1976 which has successfully addressed this problem and has provided substantial relief for those who ship slaughter livestock to a meat packer. The Packers and Stockyards Act, as amended, now requires that any monies received by or owed to meat packers are held in trust until the live animals which provided the raw material for the seller have been paid for. This has proven to be an effective and practical method of providing some assurance that the producer will be paid for his product.

In the "Report from the Secretary of Agriculture for 1982" dated April 1983, I quote the following:

> The U. S. Fifth Circuit Court of Appeals upheld the statutory trust provision of the Packers and Stockyards Act which stipulates that persons who sell livestock to a meat packer on a cash basis (to insure that payment is made) have first priority to the packer's assets. The court held that even when the packer has given a lender a security interest in inventories or receivables subject to the statutory trust, the livestock seller who has not been paid has priority over those assets. This was the first time that the trust provision, authorized by Congress in 1976, had been tested at the appeals court level. The Supreme Court subsequently denied certiorari.

Meat packers paid out $2.2 million to livestock sellers under the statutory trust provision in 1982. The Packers and Stockyards Administration (P&SA) filed 14 statutory trust cases during the year in which sellers who had not received payment for their livestock could receive financial help.

The famous Foodfair Supermarket bankruptcy of 1978 is a classic example of the effect of the Packers and Stockyards Act protection. Foodfair owned two meat packing subsidiaries and, as a result of the bankruptcy, received claims for approximately $2.6 million for livestock. Under the terms of the Packers and Stockyards Trust Recovery program, all of the livestock producers received 100% of their claims within the first year. The fruit and vegetable industry had claims of approximately $4 million of which $325,000, or only 8%, was paid the first year. There have been subsequent payments to the producers and we are informed that the Court now anticipates that the claimants will receive about 45% over the period of years ending in January 1985. With current interest rates, the value of that settlement is greatly diminished by virtue of the time involved.

An official of the Packers and Stockyards Division has advised me that their collections under the trust plan, since their act was amended in 1976, have now exceeded $20,000,000 on behalf of the sellers of livestock. He further stated that an increased awareness and understanding of the legislation has resulted in seven out of ten cases in 1982 being settled informally and that in a very recent case involving a packer in Billings, Montana, the lender-bank went so far as to gurantee prompt payment upon resubmittal of all checks for livestock which had been returned for the reason of insufficient funds.

I acknowledge and respect the genuine concern of those who may oppose or who question this legislation. However, I cannot accept the proposition that this trust arrangement will erode the ability of a legitimate buyer to obtain financing and credit for their operations. There is no evidence that financially sound receivers who possess the equity needed to support their operations need fear this proposal, and those who do not possess the equity necessary to support their operations should not be permitted to do so with values created from unpaid for produce. Any responsible lender should ascertain the existence of a genuine equity base underlying the borrower's operations.

Further, a buyer who is truly insolvent would benefit little regardless of whether this trust arrangement is in effect or not, because an insolvency is, by definition, a situation in which an entity is unable to satisfy its creditors and the question of what's in it for the buyer is moot. Rather, it is a question which creditors come first and how the assets are divided. The seller's position should not be inferior or subordinate to a banker or lender simply because they have the power to collateralize the receivables and the seller does not. Moreover, the banker has access to the financial statements of the receiver and is generally located in the same town or nearby and is in an infinitely better position to monitor his loan and the financial strength of his customer than the seller who is hundreds or thousands of miles away. The produce seller has an awesome task in evaluating, monitoring and controlling credit arrangements with dozens of buyers scattered across the entire nation. Enlightened buyers should be able to understand that this proposal will only give the sellers the right to demand that the money received from subsequent sales of their produce be properly used to cover their invoices before other creditors can completely attach the proceeds.

In conclusion, I would like to emphasize to your Committee the very thorough degree to which this proposal has been debated, discussed and publicized in our industry. Industry trade papers, such as "The Packer," the "Produce News," and the "Fruit and Vegetable Reporter" are distributed nationwide to virtually every buyer and seller of fresh produce in the United States. Each of these publications have responsibly reported the many industry discussions and the view of both proponents and opponents of this legislation during the last year and a half. The proposal has been presented to and debated by the boards and memberships of many organizations. A workshop during last year's United Fresh Fruit and Vegetable Association Convention was devoted exclusively to this topic.

A broad base of support for a PACA trust protection plan has been developed nationwide within the fresh produce industry. The proposal has been endorsed by the following organizations:

United Fresh Fruit and Vegetable Association
Western Growers Association
California Grape and Tree Fruit League

Northwest Horticultural Council
Idaho Grower Shippers Association
Idaho-Oregon Fruit and Vegetable Association
Texas Citrus and Vegetable Association
West Mexico Vegetables Distributors Association
National Potato Council
American Farm Bureau Federation
California Citrus Mutual
Florida Fruit and Vegetable Association
Yakima Valley Growers-Shippers Association
National Peach Council
American Mushroom Institute
International Apple Institute
Michigan Apple Committee
Market Service Association of Chicago
Michigan State Horticultural Society
Grower-Shipper Vegetable Association
The Greater Chicagoland Produce Wholesalers
Wenatchee Valley Traffic Association
Maine Potato Council
Maine Potato Sales Association
National Watermelon Association
Virginia State Horticultural Soceity
Florida Citrus Packers

I submit that this is one of those rare and rewarding examples of when an industry can come to the Congress with a clear and responsible request for legislation which has such a broad mandate from all segments of the industry and every geographical part of the nation. Therefore, I respectfully urge your immediate and favorable consideration.

STATEMENT OF KEITH ECKEL, PRESIDENT, PENNSYLVANIA FARMERS ASSOCIATION, REPRESENTING AMERICAN FARM BUREAU FEDERATION

I am Keith Eckel, President of the Pennsylvania Farmers Association. I appear before you today on behalf of the American Farm Bureau Federation, the nation's largest general voluntary farm organization representing producers of virtually every agricultural commodity. As a fruit and vegetable grower, I appreciate the opportunity to appear before this Committee to express Farm Bureau's support for legislation to amend the Perishable Agricultural Commodities Act.

Since 1930, the Perishable Agricultural Commodities Act (PACA) has served the produce industry well. PACA has required prompt payment between buyers and sellers of perishable agricultural commodities, such that a seller has to wait no longer than 10 days before receiving the proceeds from his sale. In addition, PACA has served as a licensing mechanism for those in the produce industry so that business from the farmer to the grocery store is conducted in an open, forthwright and honest manner.

Recently, increasing numbers of firms and businesses have begun to slow down payment to sellers for perishable agricultural commodities. In addition, buyers are declaring bankruptcy with increasing frequency or are refusing to pay for contracted perishable commodities because of insolvency. Recent statistics show that slow pay situations, that is instances in which buyers pay sellers 30 days or later from the time of receipt of invoice, have increased from 26 percent of all sales in 1976 to 50 percent of all sales in 1982. At the same time, the percentage of those who have fulfilled the obligations under the current PACA and pay within 10 days has decreased from 55 percent in 1976 to 31 percent in 1982. The result of this increasing frequency of slow pay and no pay situations is an annual cost to producers of $32 million.

Increasing numbers of bankruptcies among buyers have resulted in the seller, often the producer or grower/shipper, being left "holding the bag". That is, the seller has no way of recapturing monies due on accounts receivable in situations which a buyer declares bankruptcy and a court has retained control of all assets, to be distributed first to creditors such as banks and lending institutions. Such bankruptcies have resulted in an additional $32 million annual cost to producers.

It has become evident that United States' producers of fruit and vegetable crops need additional protection in slow pay and no pay situations. The unwritten traditional "trust relationship" that has existed between sellers and buyers is being broken with increasing frequency. Many sellers are ruined financially and contribute to the previously mentioned $64 million total.

Farm Bureau supports the establishment of a statutory trust as contained in H.R. 3867. Such a trust, administered by USDA under the PACA, would provide sellers of fruit and vegetable crops some degree of security in the marketplace. It would ensure that this traditional trust relationship that exists within the marketplace could be maintained by:

1. Finding that a burden on commerce is caused by financing arrangements under which buyers (commission merchants, dealers or brokers) who have not made payment for perishable agricultural commodities, encumber, or give lenders a security interest in such commodities, and that such arrangements are contrary to the public interest.

2. Requiring that perishable agricultural commodities received by a buyer on all transactions, and all inventories, receivables, or proceeds from such perishable agricultural commodities, shall be held by such buyers in trust for the benefit of all unpaid sellers until full payment is made.

3. Defining as an unfair trade practice the failure of any buyer to maintain the trust for the benefit of the seller as required under

this legislation, the violation of which would subject the buyer to suspension or revocation of his PACA license.

With increasing frequency, buyers are declaring bankruptcy, or because of insolvency, are refusing to pay for contracted perishables. With the enactment of H.R. 3867, USDA would be able to, as they have using similar provisions in the Packers and Stockyards Act with the livestock industry, return some semblance of sanity and trust to the marketplace. No longer would our fruit and vegetable producers be simply left "out in the cold" in the event of bankruptcies or insolvencies. Recently, two large buyers, one in New Jersey and one in Maine filed for reorganization under the bankruptcy laws. In one case, sellers are likely to lose $900,000, while in the other, as much as $349,000 may be lost to the sellers. For one of these buyers, this is the second bankruptcy in recent years.

Farm Bureau fruit and vegetable producers view this legislation to assure payment for perishable produce with considerable gravity. Therefore, it is important that this legislation apply to (1) all PACA licenses, (2) all sales, and (3) all slow pay/no pay situations. The trust must come into effect when the seller loses control of the commodity. The trust should be effective immediately when the buyer receives either ownership, possession or control.

Some would suggest that the legislation should specify that the trust be a floating, nonsegregated trust. It is Farm Bureau's view that such specification is not necessary. This is made clear with the performance over the years of similar provisions in the Packers and Stockyards Act, which has proven the practical applicability of our recommendations. In the Packers and Stockyards Act, sellers' rights have been upheld in case after case, and such action has been found not to be a burden on their industry. For that reason, similar language is deemed appropriate for fruit and vegetable producers.

Farm Bureau is pleased to have worked with the fruit and vegetable industry to develop this legislative package. Indeed, Farm Bureau's Fruit and Vegetable Advisory Committees have been discussing and refining this proposal for over two years. Most buyers and sellers now agree to the provisions contained in H.R. 3867. This includes the definition as an unfair trade practice the failing of a buyer to maintain the statutory trust. Farm Bureau believes that this provision is essential to provide enforcement ability for the statutory trust concept and to ensure that monies will indeed be available if and when such a trust is activated in the event of failure to pay.

Time honored "trust relationships" within the industry are being compromised. In order to preserve these relationships that have for so long lent stability to an uncertain market, Farm Bureau believes it is now time to commit those long held understandings in writing within the successful PACA program.

In conclusion, Farm Bureau supports enactment of H.R. 3867, without amendment. We are extremely pleased with the responsiveness and the leadership demonstrated by the sponsors of this legislation in pursuing this remedy in a timely manner. Farm Bureau will be pleased to cooperate in any way towards the enactment of this legislation.

Thank you for the opportunity to appear before you today. I would be pleased to respond to any questions at this time.

STATEMENT

OF

ARTHUR SLAVIN

EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL

OF

NEW YORK PRODUCE TRADE ASSOCIATION, INC.

Mr. Chairman and Members of the Committee:

My name is Arthur Slavin. I am Executive Vice-President and General Counsel of the New York Produce Trade Association, Inc., a non-profit membership organization, incorporated as a Board of Trade for those merchants in the New York City Terminal Market.

Our Terminal is the largest in the world, receiving and distributing perishable agricultural commodities in carloads and carload equivalents from all corners of the Country and foreign countries, and exporting domestic agricultural commodities to foreign countries all over the world. We number approximately 100 separate trading firms, employ about 6,000 people and do an aggregate business of between 2-1/2 and 3 million dollars a day. The statement which I make here represents the views and opinions of all of our members regarding the proposed amendments to the Perishable Agricultural Commodities (PACA).

We oppose H.R. 3867 in its entirety, in the strongest possible terms.

The drafting of H.R. 3867 must be commended for its simplicity, but the extreme simplicity could make it a dangerous law, and the danger lies not in what it says, but in what it does not say.

At the outset, there seems to be great reliance upon comparing the applicable trust provisions of the Packers & Stockyards Act with H.R. 3867. I respectfully submit that any comparison is completely unwarranted. Important distinctions exist:

(a) The Packers & Stockyards Act is limited in its application to packers only.

(b) The Packers & Stockyards Act trust provisions apply to "Cash" sales only. Sales on credit are exempt from the application of its trust provisions.

(c) The Packers & Stockyards Act (§409) requires the packers to pay the full purchase price of cash sales to the sellers before the close of business the next business day following the purchase and transfer of possession of the livestock - or if on a "grade and yield" basis, before the close of business the next business day following the determination of the purchase price. The trust provisions of that statute are relatively short in their application and there is little impact on the business of the packer. It would be a grave error to compare the business impact of such provisions against that which would be suffered by buyers of fruits and vegetables.

(d) The packers to whom that law applies are only a few hundred in number. There are at least 16,000 licensed dealers under the Perishable Agricultural Commodities Act. It would be safe to hazard that there are at least twice that number who are not licensed, but are subject to license. (Parenthetically, H.R. 3867 should be applicable to those who are subject to license as well as those who are actually licensed, but it is silent as to those who evade the license requirements. In this respect, the proposed statute also fails.) On the other hand, H.R. 3867 applies to all sellers; growers, shippers, packers, receivers, jobbers, chain stores and even to retail stores. It also applies to sales on credit, and the terms of such credit can range from three to six weeks.

Contemplate for a moment a normal transaction in the fruit and produce industry:

Produce purchased F.O.B. in California for delivery in New York

will be delivered to our Terminal about 5 days from the sale date. Although title to the commodity passed to the buyer at the moment it was placed aboard the carrier at the point of origin, H.R. 3867 would nevertheless impose a trust upon it at that moment. Upon receipt of the commodity by the buyer, he must refrigerate, store and sell it, at his own cost and expense. Upon resale, his customers may pay him at times ranging from 3 to 6 weeks. During all of this time the commodity, and the cash and accounts receivable emanating from this transaction, must be held in trust by him until his seller has been paid in full. In the intermittent time since he acquired title, the buyer has had his own considerable investment in the shipment: freight, handling, storage and refrigeration, rent, labor and other costs of doing business, may be as much again as the cost of the commodity.

As written, H.R. 3867, shorn of its collateral language, provides simply:

1. Such commodity, and the accounts receivable derived from the sale thereof, shall be held in trust for the benefit of all unpaid sellers of such commodity, and

2. It shall be unlawful to fail to maintain the trust.

The basic law of trusts, from ancient days to the present time, requires trust property to be segregated from non-trust property. Nothing in H.R. 3867, or in any statute or case law, to my knowledge, exempts the trust established by the provisions of H.R. 3867, or shields the buyer-trustee from this basic tenet. It must then inexorably follow that such trust res, or property, may not be used for any purpose other than to pay the seller of the commodity before the trust is released. Since the merchants in our Terminal, like countless other buyers throughout the country deal in no commodities other than perishable agricultural commodities, how then will he pay his labor, rent and other costs and expenses of doing business?

The proponents of H.R. 3867 have widely published, erroneously, we believe, that segregation of trust from non-trust funds is not intended or contemplated by this statute. But the language of the Bill plainly provides that the trust is established at the moment of sale and that failure to maintain the trust is unlawful. If non-segregation is, in fact, the intention of Congress, then the Bill should plainly say so, and therein its silence is deadly to the buyer, and creates much of the opposition to the Bill.

In support of their contention that segregation of trust from non-trust property is not required, the proponents of H.R. 3867 rely heavily upon the landmark decision by the United States Court of Appeals, 5th Circuit, in the case of the First State Bank of Miami v. Gotham Provision Company, Inc., 669 F2d 1000 (1982) involving the trust provisions of the Packers and Stockyards Act. In that action, a bankrupt's accounts receivable were derived from both "cash" sales and "credit" sales, and it could not be established which came from cash and which came from credit sales.

The Court established two principles in this action: first, that it was not the intent of Congress that a separate trust account must be established for each seller, but that all of such accounts may be commingled in a separate trust account, which it called a "floating pool", to be held for the benefit of all such sellers, to be shared by them pro-rata; secondly, it restated the time honored basic law of trusts that when trust items are commingled with non-trust items, the trust will extend to the entire commingled fund. But nowhere in this landmark decision is it even inferred that trust funds need not be segregated from non-trust funds. The Court simply unravelled the tangled situation as it found it.

The establishment of a trust covering the buyer's inventory and cash and accounts receivable derived from the sale of the com-

modity gives rise to another danger equally as grave. In the normal economy of this nation most business organizations regularly borrow from banks. This applies not only to fruit and produce buyers - it applies equally to General Motors, U.S. Steel and R.C.A. Such borrowing does not reflect adversely upon the worth or credit-worthiness of the buyer. It furnishes greater working capital, cash flow and liquidity for business firms. It is a normal and healthy economic tool in a capitalistic society. Even the proponents of H.R. 3867 employ this tool in the operation of their respective businesses.

Requisite to all bank loans is the submission of the applicant's financial statement. What would a normal balance sheet of a fairly successful fruit and produce merchant look like if you subtracted the cash, inventory and accounts receivable from the assets column? Yet, this would be the effect by impressing a trust on these items. Such property in trust would not belong to the buyer. It would belong to the seller until he was paid. The financial statement would have to reveal the trust nature of these "assets". Failure to disclose would be tantamount to rendering a false financial statement. What effect will such disclosure have, bearing in mind that in the case of the average receiver of fruits and produce his inventory and cash and accounts receivable could constitute all of his assets - or should he not disclose. Is he not in the typical "Catch 22" situation -- damned if he does and damned if he doesn't? I submit that it is extremely unlikely that the specific omission of his inventory, accounts receivable and monies derived from the sales of the produce, from his balance sheet will win him the approval of his loan application. At the very best, the amount of the loan will be severely curtailed.

The inability of the small businessman to obtain bank financing must result in driving him out of business, and in increased

bankruptcies and unemployment. How can this be in the public interest?

How about the supermarket chains? The basic law of trusts imposes upon a trustee to keep the trust property separate from his own property. The trust property must be segregated and cannot be used for anything but trust purposes. It cannot be used to pay for operational costs, payroll, rent, etc. How will the supermarket chain handle this? Can you envision the resultant bookkeeping nightmare?

And how will we solve the anomaly of title passing to buyer, in F.O.B. sales, but the commodity being held in trust for the seller? To whom does the commodity belong until seller is paid? When, in such sales, the commodity is placed aboard the carrier, the risks of transportation shifts to the buyer, who is the owner thereof? Who will be the owner of the goods - the seller or the buyer-trustee? This illustration is only the tip of the iceberg. Tampering with the basic and established rules of commerce in this industry may produce many such strange anomalies. The whole pattern of normal commercial and financial business practice in this industry could be shattered by the passage of this Bill, bearing in mind that the assets of even a highly successful firm are generally not liquid enough to provide sufficient cash flow and working capital without bank financing. In this regard it is important to note that the monies borrowed by such a company from its bank are used to pay for purchase of commodities from the very sellers who are promoting the proposed trust plan.

In our opinion, the proposed trust provision is unrealistic and unworkable. It is destructive to the whole pattern of normal commercial business practice. It is also counter-productive and self-defeating, since it would work an effect quite opposite to that which was intended. <u>It will result in slower</u> payments or inability to pay, precisely because it will have re-

duced available working capital, cash-flow and liquidity. In that event, the trust may become an empty one, devoid of assets. The proposed trust provision will create a monster. It will boomerang and harm the very persons sought to be protected.

I have practiced in this industry for over forty years and the number of significant bankruptcies of receivers in our market during that time can be counted, figuratively, on the fingers of two hands. In half of those, shippers' losses were caused by poor and hazardous credit practices. This is an excellent record. Is it now intended to introduce "big brother" regulation and supervision to eliminate the need for sensible internal credit practice on the part of the shipper? What does the ordinary businessman do to safeguard his accounts? He avoids selling a credit risk. If he wants to be paid in one week, one month, or one day, he makes that a term of the sale. He doesn't run to "big brother" for regulation. That's his job -- not that of government. To seek legislation from Congress to provide against relatively few business failures seems nothing short of "overkill".

This industry is already heavily regulated, under the watchful eye of the Regulatory Branch of the USDA, by the most stringent provisions known to federal law. Poor payment practices can be remedied by applying the existing law.

H.R. 3867 is harmful not only to the buyer, but also to the small farmer. As long as I can remember, it has been a common practice for the receiver of perishable agricultural commodity to finance growing operations of small farmers by the advance of substantial monies for seed, fertilizer, labor and packing materials, and be reimbursed from the proceeds of the crop. The receiver's source of such advances is his bank. Bank reticence, surely to result from passage of this Bill, will curtail these necessary advances to the small farmer, and possibly drive him out of farming.

We already know that the small receiver will be hurt by this Bill.

Do we want to put both the small receiver and the small farmer out of business? Who will benefit thereby?

The introductory paragraphs of H.R. 3867 declare that a burden on commerce exists, and that the Bill is designed to protect the public interest. We respectfully suggest that there is no basis for such declaration and that the opposite is true. The passage of the Bill will create an undue burden on commerce and is against the public interest.

Thank you for this opportunity to express our opinion regarding H.R. 3867.

STATEMENT

OF

ROBERT D. "JACK" JENKINS

EXECUTIVE SECRETARY

NORTH CAROLINA YAM COMMISSION, INC.

My name is Robert D. "Jack" Jenkins, Executive Secretary of the North Carolina Yam Commission, Inc. located in Raleigh, North Carolina. The North Carolina Yam Commission is the industry association representing 1800 growers and shippers of sweet potatoes in North Carolina. The Yam Commission's membership is made up of growers, shippers and processors of North Carolina yams (sweet potatoes).

I am pleased to have this opportunity to appear before the committee to testify in support of HR 3867, a bill to amend the Perishable Agricultural Commodities Act by imposing a trust on perishable commodities and proceeds from sales of perishable agricultural commodities for the benefit of unpaid sellers.

Most of the 55 to 60 grower-shippers in North Carolina are small business and their business is a gamble. The growing, harvesting, packing and shipping of sweet potatoes is like all perishable produce, a real gamble.

With the high costs of everything a grower-shipper puts into his commodity the returns are delayed until his crop is harvested and sold. If the grower-shipper connot receive his returns when he has made a sale, then he may not be able to survive. The grower has most of his assets tied up in land and machinery as well as fertilizer, chemical, labor, etc.

Most of the people our grower-shipper sell to are located hundreds of miles away. Lots of time, the commodity is sold while the product is enroute. Under these conditions credit checks, conditional sales agreements and other traditional safeguards are not possible. Therefore our grower-shippers

HAVE LITTLE PROTECTION WHERE A BUYER HAS FAILED TO MAKE PAYMENT, THIS BILL WOULD REMEDY THIS SITUATION BY IMPRESSING A TRUST IN BEHALF OF THE UNPAID SELLER.

WE HOPE TO ESTABLISH A TRUST IN FAVOR OF THE UNPAID SELLER SO THAT THE PURCHASER, WHO IS LICENSED UNDER PACA, OR WHO IS SUBJECT TO PACA, HOLDS THE SHIPMENT OF PRODUCE, OR PROCEEDS DERIVED THEREOF, IN TRUST UNTIL THE SELLER IS PAID.

WE BELIEVE THAT THE SAME CONCEPT THAT HAS WORKED WITH THE PACKERS AND STOCKYARD ACT FOR THE MEAT PACKING INDUSTRY WILL WORK IN OUR INDUSTRY. WE BELIEVE THAT THE SELLERS OF FRESH PRODUCE HAVE A NEED FOR SECURITY AND STABILITY. THEREFORE, WE URGE THE SUBCOMMITTEE TO ACT FAVORABLY ON THIS LEGISLATION.

STATEMENT OF

THE WESTERN GROWERS ASSOCIATION

BY

JASPER E. HEMPEL

VICE PRESIDENT - GOVERNMENT AFFAIRS

Good Morning, Mr. Chairman and members of this committee. I am Jasper E. Hempel, Vice-President, Government Affairs, for the Western Growers Association (WGA), Irvine, California. The WGA, founded in 1926, is an agricultural trade association which represents 2200 members in California and Arizona, of which 1100 are growers, shippers, and sellers of fresh fruits and vegetables. Our member growers and shippers produce approximately 50% of the fresh fruits and vegetables consumed in the United States.

The Western Growers Association encouraged the introduction of and wholeheartedly supports HR 3867, which amends the Perishable Agricultural Commodities Act (PACA) of 1930. The bill will establish a much needed trust protection plan for sellers of fresh fruits and vegetables.

Mr. John Norton and Mr. Verne Highley and others on this panel have or will discuss how the PACA has established and maintained an orderly marketing system for fresh fruits and vegetables by regulating licensed buyers and sellers of fresh fruits and vegetables in the United States, and how the provisions of HR 3867 impacts on the PACA. On the other hand, I will present illustrative examples as to why the legislation is so sorely needed for our industry.

Among the many services Western Growers Association provides to its members is our Marketing Services Department. Specifically, this department handles slow pay cases, no pay cases, and the insolvencies of buyers of our member sellers' products. We also handle disputes between our seller members and buyers throughout the United States over the quality and condition of the products our members ship to those buyers. In fact, in this representative capacity, our marketing department, headed by Vice-President Matthew M. McInerney, files and handles on behalf of WGA members approximately 50% of all of the complaints on file with the PACA regulatory branch of the United States Department of Agriculture.

This marketing service was instituted approximately 20 years ago to facilitate the orderly filing and handling of PACA complaints for our members. This service is offered at no charge to WGA members. The importance of the service is underscored by the fact that in the last twelve months Mr. McInerney filed, handled, settled, or negotiated 800 member complaints of slow pay, no pay, and insolvencies of buyers who breached their verbal contracts with our member sellers.

Before explaining the procedure by which WGA assists its members in resolving disputed transactions, or becomes involved with the PACA, I believe it is instructive if I explain how fresh fruit and vegetable buyers and sellers today consummate a sales transaction.

Historically, sales within the fresh fruit and vegetable industry are founded on the belief that a "man's word is his bond." From the beginning, and continuing to today, all fresh fruit and vegetable sales transactions are consummated strictly on a verbal basis, generally over the telephone.

Let me describe a transaction using the example of a typical lettuce sale:

During the summer months, the Salinas Valley of California, otherwise known as the Salad Bowl, produces well over 80% of the lettuce consumed in the United States during May through October. On any one day, the Salinas Valley ships between 350,000 to 500,000 cartons of lettuce to various market destinations throughout the world. Any one particular shipper of lettuce in the Salinas Valley sells about 20,000 cartons of lettuce each day. Each carton contains 24 heads of lettuce. So, 8,400,000 to 12,000,000 heads of lettuce are harvested and sold each day of summer from the Salinas Valley.

Typically, a salesman selling for a lettuce company daily calls a number of markets throughout the United States and contacts buyers such as wholesalers, retailers, produce brokers, and others to offer lettuce for sale. At the same time, these salesmen may be contacted in turn by other retailers, wholesalers and brokers. Usually, in the telephone conversation, which may last a brief 2 or 3 minutes, the description of lettuce quality for that day is explained, and the potential price of lettuce is discussed. After negotiation the buyer and seller may reach an agreement on the price and quantity of the lettuce to be shipped. At the time of the verbal agreement, our member lettuce sellers do not require immediate proof of the credit-

worthiness or the collateralized strength of the buyer. Instead, the seller relies on reports from industry credit reporting agencies which indicates the buyer's previous payment pattern and net worth. However, due to time constraints, the seller may accept the order and await payment before these credit reporting agency documents are received. The seller will also rely on his previous dealings with the buyer, if a previous buying relationship has been established.

In addition to the credit reporting agencies, most associations, like WGA, will issue bi-monthly or weekly delinquency reports on various delinquent buyers. The delinquency report is issued for informational purposes only and does not tell recipients of the report whether or not to sell to the delinquent buyer.

Credit reporting agencies, such as the Red Book and Blue Book, and our own delinquency report, are not issued for punitive purposes to blackball a potential buyer. Rather they were established and are continued today as protective measures. Sellers of fresh fruits and vegetables are extremely financially vulnerable and unprotected from unscrupulous buyers.

A seller of fresh fruits and vegetables has only two recourses against a non-paying or insolvent buyer. He may file a lawsuit which is very expensive and time-consuming, or he may file a formal action with the PACA regulatory branch. The latter course of action is by far the most common.

In the event of an insolvency, the seller is totally unsecured, even though he in good faith has sent the many thousand cartons of lettuce to the buyer without payment. The buyer has resold it, or has used the same as collateral for his own financial needs.

In some instances, without the seller's knowledge, the buyer may be so under-capitalized that the only collateral in the buyer's possession is the accounts receivable the buyer has generated by a subsequent sale to a customer further down the distribution chain. Some buyers have no tangible assets other than these accounts receivable.

If a buyer finances his operation solely on the basis of factoring his accounts receivables, he is engaged in the process commonly known in the industry as the "rob Peter to pay Paul" syndrome. It is not uncommon for an under-capitalized buyer to engage in pyramid type financing where the buyer purchases the fruits and vegetables, sells the product, and uses the new

accounts receivable as collateral in subsequent borrowings for cash flow purposes. Eventually the roof caves in, and the seller is left empty-handed or is paid very slowly. In either case, the seller's only recourse is to settle or to file a formal complaint with the PACA to enforce payment of the verbal contract.

However, before the complaint is formally filed, the usual procedure our members employ is to ask our marketing department to secure payment from the buyer for the contract price. We attempt to obtain the sums due through threats, begging, cajoling, negotiating and urging, or to otherwise informally settle the claim or dispute. When WGA makes the initial contact with the defaulting buyer, it is not uncommon for the distressed buyer to threaten cessation of business or bankruptcy if he is pressed too hard for payment.

As unsecured creditors, our member sellers cannot apply all of the bargaining leverage normally afforded secured creditors in like situations. In fact, unlike most other commercial transactions today, our fresh fruit and vegetable products are sold, shipped, and consumed within days; generally before the buyer has received an invoice for those products from our sellers. So, unlike most commercial transactions where tangible assets can be repossessed, our products are gone. We cannot repossess our product from the defaulting buyer. Without a trust plan, we must rely solely on a buyer's verbal promise to pay.

Our industry's need for a trust protection plan is underscored by a review of slow pay, no pay, and insolvency statistics that our marketing department maintains.

We maintain our records on the basis of files opened, closed, and the amount of money returned to our members each calendar year.

In 1977, for example, WGA opened 451 cases. We closed or resolved 403 cases, and returned $744,030 to our members. By contrast, in 1982, WGA opened 842 cases, and closed 560 cases, returning $2,038,171 to our members.

Based on 1983 projections, we will have opened 900 cases for our members. Already this year, we have returned $1,681,329. At the same rate for the balance of 1983, we will return $2,241,771.

And, in 1982, our members lost $2,294,270 unrecovered dollars to 16 insolvent buyers.

WGA sees the trend continuing. Therefore, we strongly urge adoption of the trust provision plan in HR 3867.

In conclusion, I would like to review one other point relative to the trust fund.

In spite of what opponents may allege, there is absolutely no requirement in HR 3867 that funds be physically separated by buyers into separate trust funds.

From the initial concept of the trust fund and throughout all subsequent discussions and debate over this issue, we have made it very clear, and case law supports us, that trust funds may be commingled with a buyer's other funds. A buyer's only requirement is that if he defaults on his verbal contract, he must have under his control unencumbered funds sufficient to pay his seller for products he has received from them.

Thank you for giving me the opportunity to appear before you.

STATEMENT OF JOHN M. HIMMELBERG, REPRESENTING FLORIDA FRESH FRUIT & VEGETABLE ASSOCIATION

ORLANDO, FLA.

Mr. Chairman, thank you for giving me the opportunity to share our views with this Committee.

For those members of the Committee who may not be familiar with the Florida Fruit and Vegetable Association ("FFVA") please permit me to introduce FFVA.

FFVA is an agricultural trade and service association with substantial memberships in the State of Florida among growers and shippers of fresh vegetables, tropical fruits, sugar cane and citrus.

FFVA strongly supports the legislation under consideration today. By impressing a trust on the commodities and sales proceeds of perishable agricultural commodities, the unpaid seller will be aided.

We think it important to note that the term seller will include buyers who re-sell as well as FFVA's members who are shippers/sellers. In addition, we must point out the obvious - this legislation will affect only a very small number of companies. The vast majority of businesses which pay in a timely fashion, which do not go into bankruptcy, never will be affected by this amendment.

It is only in the relatively few trouble situations where this bill will come into play. And, in those cases, this bill provides much needed protection to sellers who have not been paid in a timely fashion as required by law. In essence, the bill provides an early warning system concerning those companies which are not meeting their payment responsibilities; and, it provides an opportunity for sellers in a bankruptcy situation to be paid for produce which they have grown or paid for, where before no such opportunity existed.

A careful examination of the impact of this legislation indicates the burden on affected buyers will be minimal. Again,

we note almost all transactions will not be affected by this bill. The bill merely establishes a procedure whereby a seller can gain a little more protection for the produce sold where the buyer refuses to pay for the produce or goes into bankruptcy.

The buyer need not specially segregate funds; therefore, there are no additional record-keeping requirements. We are told by USDA officials - and we believe them - that USDA's first involvement after a seller invokes the trust provision will be to contact the buyer to work out the problem informally. Indeed, the buyer simply has to pay for the produce received to satisfy the trust obligation.

This bill will not prohibit a produce buyer from getting a loan. Bankers will continue to make loans on the basis of the financial condition of the buyer as a whole.

In summary, this legislation will never be used by most people in the produce industry. And, in those few cases where its provisions are invoked it will provide a procedure for payment to sellers.

This trust protection has been greatly needed by the producers and sellers of perishable agricultural commodities, who, in the past, often had to wait for extended periods of time for payment, or received pennies on the dollar in a bankruptcy proceeding as a general creditor or, as has been most likely, received nothing at all.

The Association believes strongly that this legislation will close a loophole which has caused serious economic injury to sellers of perishable commodities. With this legislation, sellers will be afforded a small measure of protection in a limited area.

The Association urges the prompt consideration and passage of this legislation.

STATEMENT OF JERRY LARSON
VICE PRESIDENT, LEGISLATIVE AFFAIRS
NATIONAL POTATO COUNCIL

GOOD MORNING, MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE. MY NAME IS JERRY LARSON. I AM A POTATO FARMER FROM CLIMAX, MINNESOTA, AND VICE PRESIDENT - LEGISLATIVE AFFAIRS, OF THE NATIONAL POTATO COUNCIL, THE NON-PROFIT TRADE ASSOCIATION REPRESENTING OVER 13,000 POTATO PRODUCERS IN THE 36 STATES. I AM PLEASED TO HAVE THE OPPORTUNITY TO COME BEFORE YOU THIS MORNING AND PRESENT THE NATIONAL POTATO COUNCIL'S FULL SUPPORT FOR S. 2052, AMENDING THE PERISHABLE AGRICULTURAL COMMODITIES ACT TO PROVIDE A STATUTORY TRUST ON THE COMMODITIES AND SALES PROCEEDS FOR THE BENEFIT OF THE UNPAID SELLER.

SINCE OTHER WITNESSES TODAY WILL BE GOING INTO THIS LEGISLATION IN GREAT DETAIL, I WOULD SIMPLY LIKE TO MAKE A FEW GENERAL OBSERVATIONS CONCERNING THE NEED FOR THIS LEGISLATION.

FIRST, THE NATURE OF THE FRESH PRODUCE TRADE IS UNIQUE IN THAT OFTEN TIMES THE SELLER AND BUYER ARE HALF A CONTINENT AWAY FROM EACH OTHER WITH THE TRADING DONE WHILE THE COMMODITY IS IN TRANSIT. DUE TO THE NATURE OF THE BUSINESS AND THE RESULTANT DAY TO DAY PRICE SWINGS, TRADING MUST BE DONE QUICKLY -- OFTEN TIMES NOT ALLOWING THE SELLER TIME TO ADEQUATELY ASSESS THE CREDIT WORTHINESS OF THE BUYER. IF FOR SOME REASON, PAYMENT IS NOT MADE, OR THE BUYER GOES OUT OF BUSINESS, THE SELLER SIMPLY BECOMES AN UNSECURED CREDITOR OF THE BUYER RESULTING IN VIRTUALLY NO PROTECTION IN THE EVENT OF ANY SUIT FOR DAMAGES.

A CLASSIC EXAMPLE OF THIS SITUATION AROSE DURING THE FOOD FAIR BANKRUPCY A FEW YEARS AGO, WHERE THE UNSECURED PRODUCE SUPPLIERS ARE STILL ATTEMPTING TO COLLECT THE FULL DOLLAR VALUE OF THEIR COMMODITIES. INTERESTINGLY ENOUGH, THROUGH THE ADDITION OF LANGUAGE TO THE PACKERS ANS STOCKYARDS ACT SIMILAR TO THAT CONTAINED IN S. 2052, SUPPLIERS OF MEAT TO

FOOD FAIR WERE GIVEN SECURED CREDITOR STATUS, AND THUS RECOVERED MOST, IF NOT ALL, OF THE MONEY DUE THEM.

A SECOND IMPORTANT BENEFIT OF THIS LEGISLATION WILL BE CLEANING UP THE SO-CALLED SLOW PAY/NO PAY PROBLEMS WHICH HAVE PLAGUED THE PRODUCE INDUSTRY, ESPECIALLY DURING TIMES OF A DOWNTURN IN THE ECONOMY. EVEN THOUGH THE PACA REGULATIONS DEFINE "FULL PAYMENT PROMTLY" AS "PAYMENT FOR PRODUCE PURCHASED BY A BUYER, WITHIN TEN DAYS AFTER THE DAY ON WHICH THE PRODUCE IS ACCEPTED," IN PRACTICE, THIS TEN DAY TIME PERIOD OFTEN BECOMES THIRTY, SIXTY, NINETY OR MORE DAYS, DEPENDING UPON THE STATE OF THE ECONOMY.

THE LANGUAGE CONTAINED IN S. 2052 REQUIRES THE UNPAID SELLER TO FILE NOTICE WITH THE SECRETARY WITHIN THIRTY DAYS AFTER EITHER THE TEN DAY TIME-FRAME SET FORTH IN THE REGULATIONS, THIRTY DAYS AFTER THE EXPIRATION OF ANY OTHER TIME-FRAME AGREED TO IN ADVANCE BY THE SELLER AND BUYER, OR WITHIN THIRTY DAYS AFTER THE SELLER RECEIVES NOTICE THAT THE PAYMENT PRESENTED HAS BEEN DISHONORED. THEREFORE, IN ORDER FOR THE UNPAID SELLER TO RETAIN THE BENEFITS OF THE TRUST, HE MUST ACT WITHIN A SET TIME-FRAME, WHICH IN TURN SHOULD HAVE THE EFFECT OF CONSIDERABLY SHORTENING THE TIME HE MUST WAIT FOR FULL PAYMENT FOR HIS COMMODITY. THIS LANGUAGE WILL PROVE TO BE EXTREMELY BENEFICIAL TO THE SMALLER GROWERS/SHIPPERS, WHO MANY TIMES MUST WAIT THREE MONTHS OR MORE FOR FULL PAYMENT.

IN CLOSING, THE NATIONAL POTATO COUNCIL WISHES TO EXPRESS IT'S SINCERE THANKS AND SUPPORT FOR THE INTRODUCTION OF THIS MUCH NEEDED LEGISLATION. AS THE PRODUCE INDUSTRY CONTINUES TO GO THROUGH RAPID CHANGES, WE FEEL IT IS VITALLY IMPORTANT THAT THE LAWS GOVERNING THESE TRANSACTIONS BE UPDATED TO REFLECT THE NEEDS OF THE INDUSTRY. MR. CHAIRMAN, I WILL BE HAPPY TO ATTEMPT TO ANSWER ANY QUESTIONS YOU MAY HAVE.

THANK YOU.

II

98TH CONGRESS
1ST SESSION

S. 2052

To amend the Perishable Agricultural Commodities Act, 1930, by impressing a trust on perishable agricultural commodities and sales proceeds of such commodities for the benefit of the unpaid seller, and for other purposes.

IN THE SENATE OF THE UNITED STATES

NOVEMBER 4 (legislative day, OCTOBER 31), 1983

Mr. HELMS (for himself, Mr. HUDDLESTON, Mrs. HAWKINS, Mr. WILSON, and Mr. SYMMS) introduced the following bill; which was read twice and referred to the Committee on Agriculture, Nutrition, and Forestry

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A BILL

To amend the Perishable A ricultural Commodities Act, 1930, by impressing a trust on perishable agricultural commodities and sales proceeds of such commodities for the benefit of the unpaid seller, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 5 of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499e) is amended by adding at the end thereof a new subsection to read as follows:

"(c)(1) It is hereby found that a burden on commerce in perishable agricultural commodities is caused by financing arrangements under which commission merchants, dealers, or

brokers, who have not made payment for perishable agricultural commodities purchased, contracted to be purchased, or otherwise handled by the on behalf of another person, encumber or give lenders a security interest in such commodities, or on inventories of or receivables or proceeds from food or other products derived from such commodities, and that such arrangements are contrary to the public interest. This subsection is intended to remedy such burden on commerce in perishable agricultural commodities and to protect the public interest.

"(2) Perishable agricultural commodities received by a commission merchant, dealer, or broker in all transactions, and all inventories of or receivables or proceeds from food or other products derived from perishable agricultural commodities, shall be held by such commission merchant, dealer, or broker in trust for the benefit of all unpaid suppliers or sellers of such commodities or agents involved in the transactions until full payment of the sums owing in connection with such transactions has been received by such unpaid suppliers, sellers, or agents. Payment shall not be considered to have been made if the supplier, seller, or agent receives a payment instrument which is dishonored. The provisions of this subsection shall not apply to transactions between a cooperative association (as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) and its members.

"(3) The unpaid supplier, seller, or agent shall lose the benefits of such trust unless such person has given written notice of intent to preserve the benefits of the trust to the commission merchant, dealer, or broker and has filed such notice with the Secretary within thirty calendar days (i) after expiration of the time by which payment must be made, as prescribed under regulations issued by the Secretary, (ii) after expiration of such other time by which payment must be made, as the parties have expressly agreed to in writing before entering into the transaction, or (iii) after the time the supplier, seller, or agent has received notice that the payment instrument promptly presented for payment has been dishonored. When the parties expressly agree to a payment time period different from that established by the Secretary, a copy of such agreement shall be filed in the records of each party to the transaction and the terms of payment shall be disclosed on invoices, accountings, and other documents relating to the transaction.

"(4) The several district courts of the United States are vested with jurisdiction specifically to entertain (i) actions by trust beneficiaries to enforce payment from the trust, and (ii) actions by the Secretary to prevent and restrain dissipation of the trust.".

SEC. 2. Section 2(4) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499b(4)) is amended by

adding after the semicolon at the end of the paragraph "or to fail to maintain the trust as required under section 5(c);".

STAFF SUMMARY OF S. 2052

The bill would amend the Perishable Agricultural Commodities Act, 1930, to establish statutory trusts in connection with transactions involving perishable agricultural commodities. The principal features of the bill are as follows:

(1) The bill requires commission merchants, dealers, and brokers (handlers) who receive perishable agricultural commodities, to hold the commodities, and any products derived therefrom, or any accounts receivable or proceeds from the sale of such commodities or products, in trust for the benefit of the supplier or seller (or agent thereof) of the commodities until full payment is made.

(2) The bill exempts from the trust provisions transactions between an agricultural cooperative and it members.

(3) In order to perserve the trust benefits, the bill requires the supplier or seller of commodities to provide written notice to the handler and the Secretary of Agriculture, within 30 days after—expiration of the time for payment specified in the regulations; expiration of the time for payment agreed to in writing by the parties to the transaction if different than the time specified by regulation; or receipt by the seller or supplier of notice that the payment instrument was dishonored.

(4) The bill provides for enforcement of the trust by the trust beneficiaries or the Secretary in the Federal courts.

(5) The bill makes the failure of a handler to maintain the trust unlawful for purposes of the PACA.

DEPARTMENT OF AGRICULTURE,
OFFICE OF THE SECRETARY,
Washington, D.C., December 22, 1983.

Hon. JESSE HELMS,
Chairman, Committee on Agriculture, Nutrition, and Forestry, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This responds to your request for a report on S. 2052, a bill "To amend the Perishable Agricultural Commodities Act, 1930, by impressing a trust on the commodities and sales proceeds for perishable agricultural commodities for the benefit of the unpaid seller, and for other purposes."

The Department recommends that S. 2052 be enacted.

S. 2052 would require prompt payment for fruits and vegetables and impress a trust on the commodities, accounts receivable and proceeds of resale for the benefit of unpaid suppliers. Regulated commission merchants, dealers and brokers in such commodities would be required to hold in trust product inventory, receivables due, and proceeds from the sale of food or other products derived therefrom for the benefit of unpaid sellers or agents. Transactions between agricultural cooperative associations and their members would be exempt from the trust provisions. A seller who had not been paid for produce within the time agreed upon in the contract would be required to act to preserve its right to trust benefits by giving timely written notice to the debtor of intent to preserve its benefits, and by filing the notice with the Secretary of Agriculture. Any failure to maintain the trust would be unfair conduct in violation of the Act which could result in the withdrawal of the trader's license. The district courts of the United States would be vested with jurisdiction to entertain (a) actions by trust beneficiaries to enforce payment from the trust, and (b) actions by the Secretary of Agriculture to prevent and restrain dissipation of the trust.

Because of the highly perishable nature of the commodities and distance of production from markets, industry trading is fast moving and informal. Large volumes of commodities are contracted and shipped after telephone negotiations and without in-depth credit checks. Producer-sellers greatly outnumber buyers, and pressure is on sellers to complete sales of all available tonnage before buyers switch their purchasing activities to different commodities or other producing areas.

Industry business failures and delays by firms in making payment for produce have increased sharply. When there is a business failure, security interest holders divert debtors' assets away from produce sellers. Unsecured produce sellers recover very little, if any, money when a defunct firm's assets are distributed. Sellers are unable to protect themselves against this abnormal risk because agreements giving others a blanket security interest in the buyers' liquid assets are unknown to them at the time of sale, or may be entered into after sales are consummated.

The Perishable Agricultural Commodities Act of 1930, as amended, (PACA), does not presently include authority to deal effectively with the slow-pay no-pay problems other than to remove the right of the violator to trade. The enactment of this legislation would add stability to the marketplace and overcome this abnormal risk

burden by earmarking trust money to pay produce accounts when they come due. Also, in the event of business failures, trust funds would be applied to produce accounts and not distributed to other creditors. Traders would be able to carry on their day-to-day business confident that described types of unwarranted losses will be minimized. This legislation would benefit producer-sellers and all other firms trading under the Act since each buyer in the marketing chain becomes a seller in its own turn. If S. 2052 is enacted, a conservative estimate of recovery of otherwise uncollectable funds because of slow pay and business failures would be approximately $65 million annually.

The trust provisions of S. 2052 are patterned along the lines of those established for packers pursuant to Section 206 of the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 196).

It is believed that cost of administering the provisions of this bill would total approximately $450,000 per year beginning with fiscal year 1984. These costs will be paid from the PACA fund which consists of license fees paid by industry firms (7 U.S.C. 499c). The current statutory ceiling on license fees is adequate to permit funding through fiscal year 1985.

The Office of Management and Budget advises that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

RICHARD E. LYNG,
Acting Secretary.

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